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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 576

JOHN T. CALLAHAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 16, 1931

CERTIORARI GRANTED JANUARY 25, 1932

(36,390)

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[fols. a & 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE, JUNE TERM, 1928

No. 2

UNITED STATES OF AMERICA

v.

JOHN T. CALLAHAN,* alias CHIC CALLAHAN, alias —— BLAKE, Charles Newton, alias Charles R. Brown, Albert Knickle

Docket Entries

June 12, 1928.— The Grand Jury return "A True Bill"; same day bill filed.

Sept. 18, 1928.—Defendants' motion to quash indictment, filed.

Nov. 23, 1928.—Hearing on defendants' motion to quash indictment.

May 13, 1929.—Order that defendant, John T. Callahan, alias &c.; be held in bail in the sum of Five Thousand Dollars ($5,000.00); same day defendant enters into a recognizance in open court in the sum of Five Thousand Dollars ($5,000.) with Detroit Fidelity and Surety Company as [fol. 2] surety; same day recognizance filed and defendant discharged.

May 13, 1929.—Order granting defendant, John T. Callahan, alias &c. leave to file demurrer to indictment; same day demurrer filed.

Nov. 19, 1929.—Joinder in demurrer, filed.

Nov. 19, 1929.—Hearing on demurrer of John T. Callahan to indictment.

Dec. 4, 1929.—Opinion of the court, filed.

Dec. 13, 1929.—Order that motion to quash and demurrer of John T. Callahan, defendant, be overruled.

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* NOTE.—Callahan only defendant apprehended and placed on trial.

Dec. 13, 1929.—Order for arraignment and defendant arraigned.

Dec. 13, 1929.—Defendant pleads "Not Guilty."

Jan. 13, 1930.—Order that severance be granted and that John T. Callahan, defendant, be placed on trial.

Jan. 13, 1930.—Trial.

Jan. 14, 1930.—Trial.

Jan. 14, 1930.—Nolle prosequi entered to count two.

Jan. 14, 1930.—Verdict: "Guilty," with recommendation to mercy.

Jan. 14, 1930.—Defendant moves for a new trial and in arrest of judgment; reasons to be filed within four days.

Jan. 14, 1930—Order that bail of defendant be increased to fifteen thousand Dollars ($15,000.) and that defendant [fol. 3] enter into an additional recognizance in the sum of Ten Thousand Dollars ($10,000).

Jan. 14, 1930.—Mittimus issued.

Jan. 15, 1930.—John T. Callahan, defendant, enters into additional recognizance in open court in the sum of Ten Thousand Dollars with The Greater City Surety & Indemnity Corporation as surety; same day recognizance filed and defendant discharged.

Jan. 18, 1930.—Reasons in support of motion for new trial, filed.

Jan. 18, 1930.—Hearing on defendant's motion for a new trial and in arrest of judgment; same day order denying motion.

Jan. 18, 1930—Motion for judgment:

Sentence

That said defendant forfeit and pay to the United States a fine of Two Thousand Five Hundred Dollars ($2,500.00) and be imprisoned in the United States Penitentiary, at Atlanta, Georgia, for the term of one year and one day, beginning on this eighteenth day of January, A. D. 1930 and ending on the eighteenth day of January, A. D. 1931.

Jan. 18, 1930.—Petition of John T. Callahan for appeal, with assignment of errors, filed; same day order allowing appeal, bond to be given by defendant in the sum of Fifteen [fol. 4] Thousand Dollars ($15,000.00).

Jan. 18, 1930.—Citation issued.

Jan. 18, 1930.—John T. Callahan, defendant, enters into recognizance in open court, in the sum of Fifteen Thousand Dollars ($15,000.), pending appeal, with The Greater City Surety and Indemnity Corporation, as surety; same day bond filed and defendant discharged.

Jan. 18, 1930.—Citation with acceptance of service by Leonard E. Wales, United States Attorney, endorsed thereon, filed.

Jan. 24, 1930.—Marshal returns on Mittumus "served" &c.; same day writ filed.

Feb. 8, 1930.—Bill of exceptions signed and filed.

Feb. 10, 1930.—Præcipe for transcript of record on appeal, with acceptance of service of U. S. District Attorney endorsed thereon, filed.

[fol. 5] IN UNITED STATES DISTRICT COURT, JUNE TERM, 1928

No. 2

Violation of 19 United States Code Annotated, Section 497

UNITED STATES OF AMERICA,

v.

CHARLES NEWTON, alias CHARLES R. BROWN; ALBERT Knickle, John T. Callahan, alias Chic Callahan, alias —— Blake

INDICTMENT—Filed June 12, 1928

DISTRICT OF DELAWARE, ss:

1. The Grand Jurors of the United States of America inquiring in and for the District of Delaware, upon their respective oaths and affirmations respectively do present:

That, heretofore, to wit, on or about the tenth day of November, A. D. 1927, the said defendants, Charles Newton, alias Charles R. Brown and Albert Knickle, both late of the District of Delaware, and within the jurisdiction of this Court, did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United

States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware, near the town of Lewes, Sussex County, and State of Delaware, certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit, Scotch malt, whiskey, gin, peach and apricot brandy, creme de menthe, Kummel, sparkling burgundy and other alcoholic liquors, the exact kinds and amounts of which are to the grand jurors unknown—all [fol. 6] of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the Provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922—in that the said defendants did import and bring and assist in importing and bringing into the United States, to wit, within the territorial waters of the District of Delaware, from St. Pierre-Miquelon as aforesaid, the said merchandise, without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the said Tariff Act of 1922, and in that said merchandise was then and there by the said defendants imported and brought into the United States without payment of the customs duties thereon as required by Schedule 8 of said Tariff Act of 1922, and in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3 of Title 2 of the National Prohibition Act, the said defendants then and there well knowing that said merchandise was so imported and brought into the United States contrary to law as aforesaid.

And the Grand Jurors do further present that the said defendant, John T. Callahan, alias Chic Callahan, alias —— Blake, late of the District of Delaware, and within the jurisdiction of this court, to wit, on or about the tenth day of November, A. D. 1927, unlawfully, wilfully, knowingly, and feloniously did aid, abet, incite, counsel and procure the said Charles Newton, alias Charles R. Brown and Albert Knickle to commit and in committing in the manner and form aforesaid, the offense aforesaid, contrary to the form, force and effect of the act of Congress in such case made and provided and against the peace and dignity of the United States.

[fol. 7] 2. And the Grand Jurors aforesaid inquiring as aforesaid upon their respective oaths and affirmations respectively do further present:

That heretofore, to wit, on or about the tenth day of November, A. D. 1927, the said defendants, John T. Callahan, alias Chic Callahan, alias —— Blaké, Charles Newton, alias Charles R. Brown, and Albert Knickle, all late of the District of Delaware, and within the jurisdiction of this Court, did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon into the territorial waters of the District of Delaware, near the town of Lewes, Sussex County, and State of Delaware, certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit, Scotch malt, whiskey, gin, peach and apricot brandy, creme de menthe, kummel, sparkling burgundy, and other alcoholic liquors, the exact kinds and amounts of which are to the Grand Jurors unknown—all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922—in that the said defendants did import and bring and assist in importing and bringing into the United States, to wit, within the territorial waters of the District of Delaware, from St. Pierre-Miquelon as aforesaid, the said merchandise without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of said Tariff Act of 1922, and in that said merchandise was then and there by the said defendants imported and brought into the United States without payment of the customs duties thereon as required by Schedule 8 of said Tariff Act of 1922, and in that said merchandise [fol. 8] was then and there by said defendants imported and brought into the United States in violation of Section 3 of Title 2 of the National Prohibition Act, the said defendants then and there well knowing that said merchandise was so imported and brought into the United States contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(Sgd.) Leonard E. Wales, United States Attorney,
District of Delaware.

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH—Filed September 18, 1928

And now comes the defendants, Charles Newton, alias Charles R. Brown, and John T. Callahan, alias Chic Callahan, alias Blake, by George L. Burton and John Kafes and Philip L. Garrett, their attorneys, and say that the indictment herein and each and every count therein are not sufficient in the law, to require the defendants to plead thereto, and these defendants move the Court to quash the indictment and each and every count thereof, and for special reasons show unto the Court the following:

These defendants upon a previous trial in this court, upon an indictment No. 12 of December Term, 1927, were acquitted upon said indictment at December Term, 1927, in which indictment the facts and part of the issues involved were exactly the same *and* the identical issues and facts involved in this present indictment, and the facts and issues involved in this present indictment have been passed upon and adjudicated and determined on said indictment at December Term, 1927, by a jury in this court, a court [fol. 9] of competent jurisdiction and one which had jurisdiction to hear said cause, and in which said indictment the United States and these defendants were parties.

(Sgd.) George L. Burton and John Kafes, (Sgd.) Philip L. Garrett, Attorneys for the Defendants, Charles Newton, alias Charles R. Brown, and John T. Callahan, alias Chic Callahan, alias Blake.

IN UNITED STATES DISTRICT COURT

DEMURRER—Filed May 13, 1929

Now comes the defendant, John T. Callahan, and hereby demurs to the form and sufficiency of Count I of the indictment.

I. The requirement to obtain a permit from the Commissioner of Internal Revenue, pursuant to Schedule 8 of the Tariff Act of 1922, as alleged in said Count I of the indictment, was repealed by the Act of March 3, 1927, which became effective April 1, 1927, and was not the law on the tenth day of November, 1927.

II. That the said Count I of the indictment is defective in that it does not charge in what manner the defendant John T. Callahan violated Section 497, title 19, of the United States Code Annotated.

III. That the allegations set forth in Count I of the indictment, more particularly referring to the portion thereof which alleges that the customs duties were not paid as required by Schedule 8 of the Tariff Act of 1922, do not set forth an offense for the reason that said indictment fails to [fol. 10] state that the merchandise was brought into a port of entry, which is one of the elements of the offense.

IV. The allegations set forth in said Count I of the indictment charging the defendant with importing and bringing into the United States the merchandise in violation of Section 3, title 2, of the National Prohibition Act do not set forth an offense under Section 497, title 19, of the United States Code Annotated, but sets forth an offense under the National Prohibition Act, for which punishment is provided for under the National Prohibition Act.

V. That the said indictment is duplicitous in that it sets forth two offenses, to wit: (a) violation of section 497, title 19, of the United States Code Annotated, and (B) violation of the National Prohibition Act, and the punishment provided under the said respective acts are not the same.

VI. The said Count I in the indictment is further defective, more particularly that portion thereof which alleges that the merchandise was imported and brought into the United States in violation of Section 3, title 2, of the National Prohibition Act, for the reason that it merely states a conclusion and does not state facts setting forth in what manner the National Prohibition Act was violated.

VII. That the defendant, John T. Callahan, demurs to Count II of the indictment for the same reasons as hereinbefore set forth with reference to Count I hereof.

(Sgd.) Louis Halle, Attorney for Defendant Callahan.

[fol. 11] I hereby certify that the foregoing demurrer is well founded in law and is not interposed for the purpose of delay.

(Sgd.) Louis Halle.

IN UNITED STATES DISTRICT COURT

OPINION OF COURT—Filed December 4, 1929

Each count of the indictment charges the defendants with importing and bringing into the United States intoxicating liquor in violation of Section 593 (b) of The Tariff Act of 1922 which forbids importations contrary to law. The first count charges the defendant, Callahan, as aider and abettor of other defendants, the second as principal. The facts alleged to show that the importation was contrary to law are that it was made (1) without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of The Tariff Act of 1922, (2) without payment of the customs duties thereon as required by Schedule 8 of The Tariff Act of 1922, and (3) in violation of Section 3 of Title 2 of The National Prohibition Act. Each count is demurred to by the defendant, Callahan.

The demurrer is in effect a denial that any of the three allegations of the indictment discloses a violation of Section 593 (b) In support of his challenge of the first of these allegations the defendant shows that the date of the importation is fixed by the indictment as November 10, 1927, that on April 1, 1927, the Act of Congress of March 3, 1927, entitled "An Act to Create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury," went into effect and that by virtue of Section 4 of that Act and the regulations promulgated thereunder, particularly Sections 2009 to 2015, which became effective October 1, [fol. 12] 1927, the power to issue permits for the importation of intoxicating liquor was transferred from the Commissioner of Internal Revenue to the Commissioner of Prohibition. I think this contention is sound and that, consequently, the allegation in the indictment of importation without a permit from the Commissioner of Internal Revenue fails to disclose an importation "contrary to law".

The only allegation tending to show that customs duties were due and payable is that the liquor was brought "into the territorial waters of the District of Delaware". This is not sufficient. Keck v. United States, 172 U. S. 434.

The theory upon which the defendant attacks the third allegation is that The National Prohibition Act not only prohibits the importation of intoxicating liquor but pro-

vides a penalty for so doing, that the penalty of this earlier special statute was not repealed by the later general statute, Section 593 (b) of The Tariff Act of 1922, and that, hence, importation of intoxicating liquor in violation of The National Prohibition Act is not a violation of Section 593 (b). It is, of course, well settled that a later statute, general in its terms, and not expressly repealing a prior special statute will ordinarily not affect the special provisions of such earlier statute. Ex parte Crow Dog, 109 U. S. 556, 570; Simon v. Simon, 26 Fed. (2d) 530, 532, 26 A. & E. Enc. of Law. 2d Ed. 739. But The National Prohibition Act prescribes no special penalty for importations in violation of that law. Instead, Section 29 of Title 2 of the Act contains an omnibus clause fixing penalties for violations for which no special penalty is fixed. As the subsequent Tariff Act of 1922 fixes a special penalty for importations of intoxicating liquors contrary to law, its provisions supersede, with respect to that offense, the omnibus clause of The National Prohibition Act. Kurczak v. United States, 14 [fol. 13] Fed. (2d) 109 (C. C. A. 6); United States v. Cardwell, 9 Fed. (2d) 146; Nounes v. United States, 4 Fed. (2d) 833 (C. C. A. 5).

Since the indictment sets forth one fact or set of facts showing that the importation was "contrary to law," the demurrer must be overruled.

(Sgd.) Hugh M. Morris, J.

December 4, 1929.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO QUASH—Entered December 13, 1929

It is ordered by the Court that the motion heretofore filed by John T. Callahan, one of said defendants, to quash the indictment returned in the above-entitled cause be and hereby is overruled.

To the entry of which order the said defendant, by Louis Halle, Esq., his attorney, by leave of the Court, notes an exception.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER—Entered December 13, 1929

It is ordered by the Court that the demurrer heretofore filed by John T. Callahan, one of said defendants, to the indictment returned in the above-entitled cause be and hereby is overruled.

To the entry of which order the said defendant, by Louis Halle, Esq., his attorney, by leave of the Court notes an exception.

[fol. 14] IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEA—Entered December 13, 1929

The said defendant, John T. Callahan, being present at the bar of the court;

Upon motion of the District Attorney, it is ordered by the Court that he be arraigned upon the indictment returned against him in the above-entitled cause; thereupon, the said defendant, John T. Callahan, by Louis Halle, Esq., his attorney, waives formal arraignment and the reading of said indictment, and then and there pleads "Not guilty" to the said indictment, which plea was accepted by the Court and ordered to be entered.

[fol. 15] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, JUNE TERM, 1928

No. 2

UNITED STATES OF AMERICA, Plaintiff,

v.

CHARLES NEWTON, alias CHARLES R. BROWN, ALBERT Knickle, John T. Callahan, alias Chick Callahan, alias —— Blake, Defendants

Bill of Exceptions—Filed February 8, 1930

CAPTION

Be it remembered that the above-entitled cause came on for trial at a stated term of the District Court of the United States for the District of Delaware, on January 13

and 14, A. D. 1930, before the Honorable Hugh M. Morris, United States District Judge, for the District of Delaware, presiding, and a jury duly empaneled and sworn.

Present: Leonard E. Wales, Esq., U. S. Attorney; P. Warren Green, Esq., Louis Halle, Esq., Attorneys for Defendant.

The Court: Are you ready in the United States v. Callahan?

Mr. Wales: Yes, sir.

The Court: Mr. Green, are you ready in the United States v. Callahan?

Mr. Green: Yes, your Honor. It is my understanding that there is only one defendant?

[fol. 16] Mr. Wales: There were three defendants indicted, sir, and one of them, Charles R. Brown, is now deceased, and the captain of the boat has never been apprehended since the indictment was filed, and under the circumstances, I suppose it would be proper to move for a separation.

The Court: Let a severance be granted. Is there any objection?

Mr. Green: No, none at all.

The Court: Then the jury may be drawn in the case of the United States v. Callahan.

(A jury was duly drawn, empaneled and sworn.)

The District attorney opens to the jury on behalf of the United States.

U. S. Witnesses

JAMES P. GILHOOLEY

JAMES P. GILHOOLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. On or about the third of November last, and subsequent thereto, what, if any, position did you hold under the United States Government?

A. I was a warrent officer, title, boatswain; stationed at Bayside, in charge of the "C. G. 103," at Cape May, New Jersey.

Q. Speak up as well as you can, so the last man can hear you. Your duties were what?

[fol. 17] A. My duty was in charge of the "C. G. 103," rendering all assistance that was necessary in inclement weather, aiding in distress of vessels, and also preventing smuggling on our seaboard.

Q. Was that service under what is known as the coast guard?

A. That is the coast guard, yes, sir.

Q. On or about the third of November, 1927, where were you, about 7 o'clock in the evening?

A. About 7 o'clock in the evening I was summoned from my house by Hickman, Kennedy C. Hickman.

Q. You were at home that evening?

A. At home and off duty.

Q. Then at that time and place what occurred?

A. I was summoned to Hickman's car, an automobile which stood outside of my house at Cape May, New Jersey.

Q. When you went out of the house, who did you see?

A. As I went out of the house, passing into the house two other warrant officers came in by the name of, one Osterberg and the other Lloyd, and I had invited them there to play pinochle. When I went outside to the car, I told them to go inside the house as I had some business to attend to, went into Hickman's car and there introduced to a man by the name of Blake.

Q. Who?

A. Introduced to a man by Hickman named Blake.

Q. Do you recognize that man here in court?

A. I do. sir.

Q. Where is he?

A. Sitting there with his hand on his chin.

Q. At that time did you know who he was?

A. I knew who he was on account of several days previous to that day Hickman had been telling me——

Q. Never mind what Hickman told you. Had you seen this man before?

[fol. 18] A. I saw him once or twice before, but not to know him as that name or any other name.

Q. Did you know him by any nickname?
A. I knew him as a—I knew he was a bootlegger.

Mr. Green: I object.
The Court: Objection sustained.

Q. Will you please answer the question I asked you? Did you know him by any nickname?
A. You see, very hazy, I knew him as "Chic." I can't say that I know him personally.
Q. All right. Hickman introduced him to you as Mr. Blake?
A. Yes, sir.
Q. And by what name were you introduced?
A. I was introduced to him by the name of Jordan.
Q. And who is Jordan?
A. Jordan was my immediate superior officer at Base 9.
Q. Well, did any conversation ensue between you and this defendant under the name of Blake?
A. Yes, sir.
Q. Where was Hickman during the course of that conversation?
A. The car was a Ford sedan, or a coach, I am not quite sure, with a back seat and front seat. Hickman sat in the driver's seat. Blake was in the back seat and I alongside of Blake, six inches apart.
Q. Well, now then, please state what that conversation was between you and this defendant?

Mr. Green: Just a moment. We object, because no definite place has been set. We do not know whether it is Delaware or New Jersey or any other place, although I may have certain information. The major objection at the moment is this: That any conversation can not be intro- [fol. 19] duced at this time until what we term a corpus delicti is shown.

The Court: You are absolutely correct. When it comes to that, the jury will be directed.

Mr. Green: Then this is to be considered as taken out of the order at the discretion of the Court.

The Court: It does not matter what the order is, because if the importation was shown without showing any connection with this man, I think the order is not of great importance here.

Mr. Green: I think it is discretionary.

The Court: Now then, I do not know whether the time and place have been shown in this testimony or not. Do you object on that ground?

Mr. Green: I do object only for the purpose that it should de done, that is all.

The Court: So that you may show the time and place where this conversation occurred, Mr. Wales.

Mr. Wales: The witness has indicated, sir, it was on the evening of November 7th, about 7 o'clock P. M., at his home.

The Court: Then that meets the question. And the home was where?

Mr. Green: That is it. We want to know where it was.

By Mr. Wales:

Q. Where was your home?

A. 127 Myrtle Avenue, Cape May, New Jersey.

[fol. 20] The Court: Then you may proceed with the conversation.

Mr. Wales: Just repeat to the witness the question before that.

(The last question as repeated to the witness as follows: "Q. Well now then, please state what that conversation was between you and this defendant?")

A. We started to talk about generalities, of meeting people; and also the weather, and it was starting to blow up a northwest storm. He told me of going to Nova Scotia, or Lunenberg, if I am not mistaken, and purchasing this "Charles Edwards." He said, "The darned thing could make only six or seven knots with a push," and he said, "It is an awful contraption," or words to that effect.

Q. Right there, what expression, if any, did he use about the trials of the boat?

A. Well, they stepped it off, and all it could do is about six knots. He said, "We then outfitted it at Lunenberg and went down to St. Pierre-Miquelon and tried to put on 300 kegs of malt. In doing so it lowered their freeboard too much, and they did not have enough sailing freeboard in case they came up with a stiff breeze. At that time with

300 cases they had about 6 inches freeboard, which, with any kind of a breeze, would dip their rail under." That came out in the conversation. "Then we only took off 25 kegs of malt, and she seemed to have a foot or a foot and a half of freeboard. We then put on a couple of extra cases for home consumption." He asked, "How far is it from St Pierre-Miquelon to the Delaware Capes?" I estimated it, without charts or anything, right there, about one thousand miles—1100 miles, and in the course of our figuring—and I think the figuring, I am quite sure the figuring was done on a Gulf Oil road map that Hickman had in [fol. 21] his car, and we figured that if the boat left on the twenty-seventh, which he had previously told me——

Q. 27th of what?

A. Of October, that she would arrive off the Capes that night or tomorrow, and wanted to know if I could go out that night and see if I could convoy her in. I had been telling him, and I guess Hickman had too, all along, that my name was Jordan, my immediate superior. He did not know that I was in charge of the "103." I did not want to tell him that I could go out that night because Mr. Jordan was the executive officer of the base.

Mr. Green: His impressions and thoughts are immaterial.

The Court: The mere expression of thoughts is stricken out.

Q. I want you, Mr. Gilhooley, to state only the conversation, not what you thought or what he thought, but what was actually said.

A. The reason I did not let him know my name—I had been introduced as Jordan to him, and I tried to play the part of Mr. Jordan. He said, "I would like to have you go out and bring it in." I said, "Perhaps I can go out and get the '103' tonight, because I think she is on stand-by," and he said, "That would be fine," He said, "We have a northwester and she is due off the Capes." He said, "You go out, meet her and bring her in and convoy her past the blockade." He said, "and there will be $5000 waiting for you at the drop." I said, "Where is the drop?" He said, "Off Reedy Island." We talked then about some more generalities. I do not think there was much conversation, and then he left.

[fol. 22] Q. Was the amount $5000 mentioned or some other expression used?

A. Five grand.

Q. You know what five grand means?

A. I do, sir.

Q. What does a grand mean?

A. One thousand dollars.

Q. Well, what was, if anything, said to him at the conclusion of the conversation?

A. I said I would see what I can do for him.

Q. About how long did this conversation last?

A. About a half to three-quarters of an hour.

Q. Then where did he go?

A. He left in Hickman's car.

Q. And what did you do?

A. I went into the house and told the two other warrant officers waiting there that I am going to——

Mr. Green: We object to what he told the other officers.

The Court: Let that go out. Nothing that was said by this man not in the presence of this defendant is evidence against this defendant. No conversation of this man or any other man not in the presence of the defendant is or are admissible.

Q. I said, what did you do?

A. I then went to my superior officer, Commander E. S. Addison, commander of Second Base 9, Coast Guard, Cape May, New Jersey, and related the story to him.

Q. During the course of this conversation with Callahan; what, if any, reference was made by him as to how the boat was to come in, under whose pilotage?

A. He told me that Charley Newton was aboard there, piloting it down. He was the supercargo, he told me.

[fol. 23] The Court: And what is a supercargo, as you understand it?

The Witness: A supercargo is the general business man of the boat. For instance, like a purser on an ocean steamer.

The Court: Now, what I wanted to get is this: My vague understanding of a supercargo was that he had nothing to do with the command of the vessel, that he had only to do with the cargo at arrival in port. I do not know whether

my understanding was correct or not. Will you not straighten me out?

The Witness: Charley Newton did not have a license to operate the vessel at sea——

The Court: A little louder.

The Witness: Charley Newton did not have a mariner's license of any kind, to my knowledge. He was placed aboard there——

The Court: I want to know what a supercargo is.

The Witness: Charley Newton's position aboard there

Q. What did he tell you Newton was on board for?

A. To pilot her into the Delaware Capes.

The Court: Did he or did he not say Newton was supercargo?

The Witness: I would not say either way, whether he was supercargo, but he did say, "To pilot her in the Delaware Capes."

The Court: All right.

Q. Did he tell you who Charley Newton was?

A. Well, I knew Charley Newton personally.

[fol. 24] Q. Oh, you knew him?

A. Yes, sir.

Q. Now, Mr. Gilhooley, on or about the 10th of November following, did you yourself see this "Charles Edward"?

A. Yes, sir.

Q. Where did you see her?

A. Over near Brown Shoal Buoy, on the Delaware shore, in Delaware Bay.

Q. About how far from the entrance to the Delaware Capes?

A. Four, five or six miles.

Q. When was it that you saw her?

A. About the following morning, about 9:10 o'clock, after she was seized by Mr. Osterberg.

Q. You mean the 11th of November?

A. Yes, sir.

Q. Did you go aboard her at that time?

A. I did, sir.

Q. Who else was there?

A. Aboard the vessel?

Q. I mean in the way of Government officers.

A. Mr. Jordan, Mr. Osterberg, Mr. Green, Mr. Sterner—I think Mr. Green was there, and Ensign Desses, from Base 9.

Q. Was Charles Brown or Newton on board?

A. He was down below in the hatch.

Q. At that time, what was the condition of the hatches on the boat?

A. They were still sealed. I was the man that broke them open.

Q. And after you had broken the seal—of what country were those seals, if you know?

A. You could not tell what country they were from. They were just seals over the hatch.

Q. All right. After the hatches were removed what did you see of the cargo?

[fol. 25] Mr. Green: Just a minute, please. I am sorry to make an objection. Until it is shown that this is the boat, the same boat the defendant Callahan referred to, and that there was an importation, that is not admissible until that time.

The Court: It is again a matter of order, and the objection will be overruled on that ground, until it is shown, shall be shown hereafter, or has already been shown, that the vessel that the witness is now speaking of is the vessel that was referred to by Callahan in his conversation with this witness, then of course what this vessel had on board is wholly immaterial, and I do not know, as a matter of fact, Mr. Wales, whether you have already shown whether or not this vessel is the one that was spoken of to this witness by Callahan.

Mr. Green: If it please the Court, here is the fact, that it was expected to arrive the next day, and here it is a week later——

The Court: I do not know whether the vessel was spoken of by name or not. I was not clear on that. I did not get it.

Mr. Green: If it please the Court, here is an additional point: As I understand from the testimony, it was figured that the boat would take a week to come down and would

arrive there on November 3d, and then it did not arrive until two weeks afterwards, and therefore it must be shown not only that it was the same vessel but also the same cargo.

The Court: I understand that to be your point.

Mr. Wales: Well, the testimony already is, sir, that Callahan gave the name of the schooner as the "Charles Edward."

[fol. 26] The Court: There is no doubt about that.

Mr. Wales: And she left St. Pierre-Miquelon on October 27th.

The Court: I am not clear that the testimony has shown that he spoke of the vessel by name, and you have not yet shown that this cargo left the French Island on the date that was mentioned in the conversation between the witness and Callahan, but you may proceed. It is a question of order.

By Mr. Wales:

Q. To make it absolutely certain, Mr. Gilhooley, in the course of that conversation with Callahan did he or did he not indicate the name of the schooner?

A. He did. He told me it was the "Charles Edward." May I qualify that?

Q. All right.

A. He told me "Charles Edward" and Charley Newton was aboard, and I knew Charley Newton personally and there could be no doubt about that.

Q. After the hatches were removed, did you see what its cargo was?

A. Yes, sir.

Q. How much did you see at that time?

A. I saw that the hold of the vessel was full of cases and barrels of liquor. I then broke open one case and took a sample or two samples, if I am not mistaken, of the liquor from the hold at that time, and reported it to my commanding officer.

Q. Do you know what became of those two samples?

A. The two samples of liquor were brought up here to this court and it was placed in with some other liquor that was brought down from Wilmington.

Q. Do you know what labels were on those samples, that is, to indicate what the contents were in the bottles?

[fol. 27] A. They were different, they were assorted and I do not remember.

Q. Did you remain on the boat or did you leave the boat after this took place?

A. I remained on the boat until around five or six o'clock that evening, when they started to bring her up to Philadelphia.

Q. Who, if you know, was placed in charge of it?

A. The man that seized her, Mr. Osterberg.

Q. Did you see any of the ship's papers?

A. I remember se-ing quite a few of them.

Q. Who had them?

A. Mr. Osterberg seized them at first upon going aboard the vessel, and he showed them to me when I went aboard, together with Mr. Green, Mr. Sterner and Mr. Jordan.

Q. Please look at the paper I am now handing you and state whether or not that was one of the papers which came under your observation at that time (handing paper to witness).

A. It was, sir, because I was the only one there that could speak French, and they asked me to translate it for them.

Q. Will you please state what is indicated there in ink writing, in French, and what it means?

Mr. Green: We do not know where this paper came from. It might have been among the private papers of some individual, and certainly at this time it is not admissible. I understand he asked him to read it.

The Court: It can not be done until it is admitted. It may be marked for identification and the witness may be called later to translate it subsequently, if it is admitted.

Q. This is one of the papers that came under your observation at that time?

[fol. 28] A. On the boat at that time,

Mr. Wales: I ask that it be marked for identification.

(Received and marked "Government's Exhibit A for identification.")

Q. Please examine that paper and state whether——

A. Yes, sir, this is a certificate of health.

Mr. Wales: I ask that that be marked for identification.

(Received and marked "Government's Exhibit B for identification.")

Q. And this one?
A. Yes, sir.

Mr. Wales: I ask that that be so marked.

(Received and marked "Government's Exhibit C for identification.")

Q. Is that one?
A. I saw this one, I do not recall it.
Q. Is this one?
A. Yes.

Mr. Wales: I ask that that be marked for identification.

(Received and marked "Government's Exhibit D for identification.")

Mr. Wales: Cross-examine.

Cross-examination.

By Mr. Halle:

X Q. Mr. Gilhooley, I understand you to have stated here that you knew Mr. Hickman?
A. Yes, sir.
[fol. 29] X Q. How long had you known Mr. Hickman?
A. Three years prior to 1927.
X Q. Did you ever do any business with him?
A. Yes, sir.
X Q. What kind of business?
A. I received gas and oil from him.
X Q. And was Hickman in the habit of ever coming to call at your home?
A. Yes, he brought me fish twice during the month of October.
X Q. Was he a social acquaintance of yours?
A. No, sir.
X Q. Had he ever visited your home?
A. No, sir.
X Q. Did you know that he was coming that night?

A. Yes, sir.

X Q. He told you previously that he was coming to see you?

A. Yes, sir.

X Q. And did he tell you with whom he would come?

A. Yes, sir.

X Q. And what name did he mention?

A. I can not say offhand. I can not say offhand, but the conversation with Hickman would indicate that the man was in the rum business.

X Q. So you knew what Hickman was going to come for that night?

A. Yes, sir.

X Q. And you do not recall what name he mentioned; yes or no, that is all?

A. Well, I am trying to recall, because when I was introduced to him in the car by the first name, I knew the name was Blake. Therefore, I do not think Hickman gave me his name as any name whatsoever.

X Q. And what time of the day was it that Hickman told you that he would come over to see you?

[fol. 30] A. Oh, I imagine about—will you allow me to qualify that by saying he had made several appointments to come to the house, and one or two were disappointments; he did not come; and whether he told me the day previous or that afternoon that he was coming that evening, I am not sure.

X Q. So you were prepared for Hickman's coming that night?

A. Yes, sir.

X Q. And the other two officers that came there that night, brother officers of yours, Osterberg and Lloyd, they had nothing to do with this transaction, did they?

A. No, sir.

X Q. They just came there to play pinochle?

A. Ostensibly to play pinochle. They could not get Hickman or Blake into the trap that was on.

X Q. We will get to that in a moment. Did you not testify on the previous occasion in this court about Osterberg and Blake?

A. Yes, sir.

X Q. And did you not testify on that previous occasion that you remembered it was the night of November 3d,

because on that night Osterberg and Lloyd came there to play pinochle?

A. Yes, sir.

X Q. Because your wife had a date to go to some Eastern Star meeting?

A. Yes, sir.

X Q. Did you state at that time that it was ostensibly for pinochle, but really for a trap?

A. You see——

X Q. Did you or did you not make that statement at your previous testifying?

A. I was not allowed to finish my statement at the previous testimony, sir.

[fol. 31] X Q. Well, let me read it to you?

"Q. How do you fix the date to which you have testified, Mr. Gilhooley?

"A. The night of November third I fix in this way: I invited two officers, namely Mr. Osterberg and Mr. Lloyd, to my house that night to play pinochle."

Is that correct?

A. Yes.

X Q. "A. Because my wife had to go." Then there is a stop there. And then you continue your answer.

"Because my wife on that evening was inducted into the Order of the Eastern Star, and they meet on the first and third Thursdays of the month. My wife left the house as we were talking in the car."

A. Yes, sir.

X Q. Is that correct?

A. Yes, sir.

X Q. "Q. Was it because you had to go for her, or something to that effect, that you remember it?

"A. I know it was on that evening that Callahan was there, because I had to leave my wife in the house and run outside to talk to Callahan. I could not help my wife in getting out and getting dressed up."

Is that correct?

A. Yes, sir.

X Q. Do you recall now what Mr. Osterberg and Mr. Lloyd came there for that night?

A. To play pinochle. I never mentioned anything about a trap previously. I am not saying that I did not say that, [fol. 32] of course, but I know that they came there to play pinochle.

X Q. And you were also asked to whom you first repeated this conversation that you had with Callahan, and you answered Captain Addison. You did not mention anything to Osterberg?

A. Not a word.

X Q. Or Lloyd?

A. Not a word.

X Q. You did not tell them anything?

A. No, sir, but I told them where I was going.

X Q. You told Osterberg where you were going?

A. I ran in and got my hat and coat on and told them where I was going.

X Q. You did not take them into your confidence at all?

A. I do not think I did right then, no.

X Q. Now, this happened in the State of New Jersey?

A. Yes, sir.

X Q. Callahan, as you say, told you that he would give you a five grand if you would do something?

A. Yes, sir.

X Q. And you know that that would be an illegal act?

A. I do, sir.

X Q. And the offer was illegal?

A. Yes, sir.

X Q. And that was an attempt to bribe you?

A. Yes, sir.

X Q. He had committed an offense right then and there?

A. Yes, sir.

X Q. Did you arrest him for that, yes or no?

A. No.

X Q. That is an answer. Did you tell Callahan during [fol. 33] the entire conversation that you were not in the habit of taking money of that kind?

A. No.

X Q. But you did tell Callahan that you would see what you could do for him?

A. I did.

X Q. Did Hickman know you by name?

A. Yes, sir.

X Q. And what name did he know you by?

A. Gilhooley.

X Q. And yet he introduced you as Jordan?

A. He did.

X Q. Did you want to hold yourself out as the Commander of the base?

A. Jordan was not the commander of the base.

X Q. What was Jordan's position?

A. The executive officer of the base.

X Q. He was your superior?

A. He was.

X Q. Did you want to hold yourself out to Callahan as Jordan?

A. You see, he knew the story——

X Q. I am not asking you——

A. You are asking me a leading question; you are leading me on.

The Court: Just a minute. Let us here the question. Repeat the question. If you can answer that question, say so. If you can not answer it, say so.

The Witness: I will ask him the same question today, did he stop beating his wife. It is the same thing, your Honor, because I had notified——

The Court: Now, just a minute. If you can not answer that question by reason of its form, say so.

[fol. 34] The Witness: I can not answer that question by reason of its form.

X Q. All right. When you were introduced as Jordan, did you tell Gilhooley that you were not Jordan?

A. No.

X Q. You were willing to let him think you were Jordan, yes or no?

A. I can not answer that question on account of its form.

X Q. That is an answer.

The Court: Just a moment. You are going to answer these questions or I am going to know why. I am talking to you and you are listening. You heard me, did you not?

The Witness: Yes.

The Court: All right. Do not forget it.

The Witness: May I ask you something? Your Honor, I am a Government employee, and by reason of implying

certain things it may or may not influence my position. You understand, something of that nature Mr. Wales or this gentleman has brought out at no time that Mr. Jordan or Captain Addison knew two weeks ago before this thing that I was going to pose as Mr. Jordan, and I do not want to get it inferred on the record here that I posed myself.

The Court: Mr. Wales may bring that out in his re-direct examination, but if you can not answer the questions by reason of their impoper inference, then you may say that, but that is your task, and that you will have to do.

[fol. 35] The Witness: I will watch for that.

The Court: All right.

By Mr. Halle:

X Q. Did you tell Hickman to introduce you as Jordan?

A. I did not.

X Q. Hickman knew your right name, did he not?

A. He did. May I change the answer?

X Q. Go right ahead.

A. At that night Hickman—I did not know that Hickman would introduce me as Jordan. Several nights previous to that, during some other conversation, we had arranged that I be introduced as Jordan.

X Q. Who is the first one that came to you with this proposition, and when?

A. Hickman.

X Q. And Hickman told you he would bring a man around?

A. Yes.

X Q. And did you tell Hickman prior to the night of November 3d, that you should be introduced as Jordan?

A. Yes, sir.

X Q. You previously testified in this court, is that so?

A. Yes, sir.

X Q. And did you also testify regarding this conversation?

A. Yes, sir.

X Q. Did you ever make any statement on your prior testimony as to anything about having seen Hickman previously or having arranged with Hickman to introduce you as Jordan?

A. That is a compound question. Answering the first one, I will say this: I saw Hickman an average of four

[fol. 36] or five times a week, that is, when I was there, and sometime during the course of those meetings, in one of those meetings it was arranged if I ever met Callahan it should be as Jordan.

X Q. Did you testify to that the last time you were on the witness stand?

A. I don't think I was asked that; I may have been.

X Q. Let me read this to you, page 63 of the prior record:

"Q. Did you see Callahan on the 3d of November last, and if so, where?

"A. I saw Callahan in an automobile in front of my house 127 Myrtle Avenue, West Cape May, New Jersey.

"Q. Did you at that time and place have a conversation with him?

"A. I did, sir.

"Q. What, if anything, was said by him at that time in the course of that conversation about the schooner "Charles Edwards"?

"A. I have just come back from Canada and I——"

And then continuing:

"I have just come back from Canada. I have brought Charlie Newton up to Lunenberg with me. We made arrangements for a schooner by the name of 'Charles Edward.' We took her out on a trial trip and stepped her off. We made about six or seven knots together, with sail and motor power. Couldn't get another knot out of her. We then took her down to Lunenberg and we loaded aboard her 300 cases of Malt."

Now, did you make any statement at the prior time that you were on the stand——

[fol. 37] Mr. Wales: The witness corrected himself.

The Court: Just a moment. The question has not been finished. Do not answer until the question is finished.

X Q. —that you had seen Hickman before on a number of occasions and made this appointment for this purpose?

The Court: You have an objection, Mr. Wales?

Mr. Wales: Yes.

The Court: What is the objection?

Mr. Wales: The fact that he did not testify has already been answered by this witness. He said he did not think

the question was asked him. I think he has already said that.

The Court: Is that the same question which he said he thought was not asked him?

Mr. Halle: I think it is a little bit different, your Honor.

The Court: He may answer this. I do not know whether it is the same question or not, but he may answer it.

The Witness: Repeat the question.

(The question was thereupon repeated, as follows:)

"Q. Now, did you make any statement at the prior time that you were on the stand that you had seen Hickman before on a number of occasions and you made this appointment for this purpose?"

A. For what purpose?

[fol. 38] X Q. Let me put it to you this way: Did you at the prior time that you were on the witness stand to relate this conversation with Callahan, tell the Court and jury then that you had made previous arrangements with Hickman to meet Callahan, yes or no?

Mr. Wales: I object. That is the same question in a different form.

The Court: The witness may answer it, if he remembers.

A. I had several conversations with Hickman.

The Court: No. The question is whether you testified about it at a previous hearing. If you remember, you may answer that you do. If you do not remember, say so.

The Witness: I do not remember now.

X Q. Do you remember what you stated at the prior time when you testified what Callahan told you——

The Court: Mr. Halle, if you want to check this witness's memory, do you not want to ask him about it if there is anything in your system?

Mr. Halle: I will make it direct then.

The Court: All right.

X Q. At the prior trial when you were in court here, you testified that Callahan said the following: "We then took her down to Lunenberg and we loaded her aboard with 300 cases of Malt." Do you remember making that statement?

A. Yes, sir.

X Q. Did you state at the prior trial anything about cases of liquor other than malt?

[fol. 39] A. Well, does it say there?

X Q. I am asking you?

A. Did I say anything at the prior trial?

X Q. Yes.

The Court: If you remember.

A. I do not remember.

X Q. If I tell you now that the only reference you made about what was put on the "Charles Edward" was the 300 cases, as follows:

"We then loaded her with 300 cases of malt and it took us almost a day to load it, because if we put aboard 300 cases, it would lose quite a little of her freeboard, that is, that she would be deep in the water and we would have to take off some."

A. I testified the same thing today.

X Q. Did Callahan tell you he was in St. Pierre-Miquelon?

A. I inferred——

X Q. No. Answer my question, please.

The Court: That one you will have to answer yes or no. Did Callahan tell you that he was in St. Pierre-Miquelon?

The Witness: Your Honor, may I ask you a question?

The Court: Yes.

The Witness: If I say we were in Dover, Delaware, yesterday that infers that I was there, does it not, if you and I together say "we". He told me it was "we", meaning Charley Newton and himself. That is the way I took it.

The Court: You may answer yes and explain your yes, if you want to.

[fol. 40] The Witness: I say yes on account of the pronoun that he used.

By Mr. Halle:

X Q. He said "we"?

A. We.

X Q. But did he tell you in so many words that he was at St. Pierre-Miquelon?

A. No.

X Q. You know where that is, do you not?

A. Yes, sir.

X Q. You know that it would be impossible for a man to come from St. Pierre-Miquelon over here in a week's time?

A. No.

X Q. You do not know that?

A. No.

X Q. Do you know how often boats run to St. Pierre-Miquelon?

A. Rum boats or otherwise?

X Q. No; passenger boats?

A. Regular passenger boats?

X Q. Any kind of a boat. Do you know whether there is a route from St. Pierre-Miquelon to the mainland of Canada?

A. Plenty of water and boats. I can not answer that question. I know it does not take a week to come from there.

X Q. Have you ever been up there?

A. I have been around that neighborhood, yes, sir.

X Q. Now, did Callahan tell you that he came down on the "Charles Edward"?

A. No.

X Q. So he did not come down on that boat, did he?

A. No.

X Q. So it must have been some other boat?

[fol. 41] A. Yes. I do not know how he came down.

X Q. Don't you know that the only way you can get out of St. Pierre-Miquelon is by boat?

A. And then by rail.

X Q. And then by rail?

A. Then by rail.

X Q. And a boat from St. Pierre-Miquelon to where?

A. Why, to Cape Breton, Nova Scotia, Halifax, Lunenberg.

X Q. And then down by rail?

A. Yes, sir.

X Q. Now, you do not know whether Callahan was up in St. Pierre-Miquelon or not, do you?

A. Personally, myself, I do not know.

X Q. And from the conversation that you had with him, he used the pronoun "we"?

A. We.

X Q. Whether that included himself being up in St. Pierre-Miquelon or not, you do not know?

A. No.

X Q. And that also applies to the place called Lunenberg, where the boat was outfitted?

A. What also implies "we"?

X Q. The word "we"?

A. Yes.

X Q. And whether or not he was up in Lunenberg, you do not know?

A. He told me he was on the boat when she made the trial trip.

X Q. Where?

A. He stepped it off from Lunenberg. He said, "We stepped it off."

X Q. He used the same pronoun "we"?

A. Yes.

X Q. Whether he himself did it or not, you do not know, is that not so?

[fol. 42] A. If I am not mistaken, I qualified the last time by saying he was aboard and "all we could get out of it was six or seven knots."

(After a short recess.)

X Q. Had you ever met Callahan before that night of November 3d?

A. No, sir.

X Q. You are sure of that?

A. Positively. I have seen him but I never met him.

X Q. Did you ever testify that you had ever met him before?

A. I testified——

X Q. Answer me yes or no.

A. You see it was this way. May I ask——

The Court: Yes, ask anything.

The Witness: I have been to Key West, Florida. I have been down there two years. I just arrived here last night. I saw the testimony at ten minutes to ten this morning. Now, if I make a statement two years ago, testified every bit of that, I can not remember everything what I said.

The Court: Why do you not say so.

The Witness: If I said it before when my mind was refreshed, if that record is read there——

The Court: Why do you not say that you do not remember whether you had or not?

The Witness: All right, sir.

By Mr. Halle:

X Q. You have a poor memory?

[fol. 43] A. I have a very good memory, a retentive memory for facts, etc., but I do not remember exactly everything, but I have a good memory for facts.

X Q. Well, I ask you now of your independent recollection on your memory solely, if you remember having met Callahan before the night of November 3d, 1927?

A. I remember of having seen him before. I met him, I recall it, I met him one night outside of a Chinese Chop Suey place in Cape May, when he had a Chrysler car, and he was with a lame-legged man, and we spoke a few moments on one of the corners of Cape May.

X Q. So you and Callahan were talking to one another?

A. He did not know me; I did not know him.

X Q. And just happened to talk to him?

A. Standing on the corner, small town gossip.

X Q. Let me repeat this to you:

"Q. And he repeated the story to you about having been up in Canada and getting this boat and taking it over to St. Pierre—he gave you this whole story about it without knowing you did he?

"A. Why, Mr. Callahan knew me from reputation as much as I knew him from reputation.

"Q. Oh, from reputation. He simply knew you from reputation, did he?

"A. Yes, sir, from reputation.

"Q. But you had never met him before?

"A. Oh, yes, sir, I had met him.

"Q. How long before?

"A. I had met him several times before—possibly two, three or four times before.

"Q. Then you were not very good friends?

"A. Yes, sir, as opposing generals would be.

"Q. Oh, you were opposing generals?

"A. Yes, sir."

The Witness: In the rum war.

[fol. 44] X Q. Was that correct?

A. Yes, sir.

X Q. So you did meet him two or three times before?

A. Yes, sir.

X Q. And spoke to him two or three times before?

A. I spoke to him once before, if I can correct that. I spoke to him once before.

X Q. The boat that Callahan mentioned to you I understood you to say was the "Charles and Edward"; is that the name of the boat?

A. What did I give her name as that time?

X Q. We will get to that in a moment, but tell me what you said this morning on direct examination? How did you mention the boat by name this morning?

A. No matter how I mentioned the name this morning, I am quite sure the name of the vessel is the "Charles Edward," no "and" in between whatsoever.

X Q. So, when you said "Charles and Edward" you were mistaken?

A. It was a slip.

X Q. Now, where did you meet a boat called the "Charles Edward" for the first time?

A. At Brown Shoals Buoy, Delaware Bay.

X Q. On what day?

A. The day after—the morning after Mr. Osterberg seized her.

X Q. What day was that?

A. The morning after he seized her. If he seized her on the 10th, it was the morning of the 11th; if he seized her on the 9th, it was the morning of the 10th.

X Q. And at the time you saw the vessel it was lying still?

A. Yes, sir.

X Q. And seized by the Government at that time? She had already been seized by the Government?

A. She had already been seized.

[fol. 45] X Q. Had you gone out before that time?

A. Several times before that, between——

X Q. To this boat?

A. No, not to that boat.

X Q. That is what I am asking you about. When Callahan spoke something about the goods on the boat, did Callahan tell you who placed it on the boat, or did he use that pronoun "we", or "they"?

A. I remember him saying: "I saw it loaded." I think those were his exact words—"I saw it loaded."

Mr. Wales: Please speak up a little.

The Witness: If I remember correctly, I am quite sure those are his exact words—"I saw it loaded."

X Q. Well, do you remember it or is it merely a surmise or a suspicion in your mind?

A. He did say, "I saw it loaded."

X Q. You want to change your testimony now?

A. I am changing no testimony whatsoever. I am changing no testimony.

X Q. Just give us the words that Callahan used at that time as best as you can remember?

A. You mean the whole story?

X Q. Yes.

A. To the starting of the going up after the boat and then by the time he met me, or where do you want me to start from? What do you want me to say?

X Q. I do not want you to say anything. Tell us anything you remember.

A. We spoke for three-quarters of an hour. Do you expect me to give everything?

X Q. I understood you to say before that he used the pronoun "we", but whether he was there or not, you do not know; is not that so?

A. That referred to the other conversation.

[fol. 46] X Q. To what conversation did that refer to.

A. About "we stepped it off." I am talking about loading the boat now, when he said "I saw it loaded."

X Q. In other words, when you say that Callahan used the pronoun "we", it referred to the time when he stepped it off?

A. I do not think he is a navigator or a machinist of any kind.

X Q. So you want to now say that you do not know whether Callahan was on the boat or not when the boat was stepped off, to see what speed she could make?

A. I said, "We stepped it off," and "I saw it loaded." That is the way I got it from him.

X Q. Did he tell you where that was?

A. "We stepped it off," was off Lunenberg. "I saw it loaded" was in St. Pierre-Miquelon.

X Q. He told you that?

A. That is the way the boat was loaded.

X Q. So you are not sure whether Callahan stated to you as to whether or not he was at Lunenberg?

A. He said, "We bought the boat at Lunenberg. I saw it loaded up at St. Pierre," and "I watched her sail away at 6 o'clock in the evening."

X Q. Let me ask you this: Did Callahan tell you that he was at Lunenberg?

A. He said that "We bought a boat at Lunenberg."

X Q. Can you not answer my question, please? Did Callahan tell you in so many words that he was at Lunenberg?

A. Have you got my previous testimony? Allow me to read that and I will read it off to you.

X Q. No, do not read that off to me. Tell us what you remember?

The Court: Do you want me to talk to you again?

[fol. 47] The Witness: I am a very poor witness; I know that.

The Court: You may be getting to be very soon. I am not going to speak to you again. I am going to speak to the marshal the next time.

The Witness: I am telling what I know exactly, the truth.

The Court: You are not here to argue with counsel. You are here to answer questions. If I speak to you again, it will be to the marshal. Do you understand that?

The Witness: I do not exactly know what that means.

The Court: You will know after I speak to the marshal. I am through discussing. Your task is to answer the questions. If you cannot answer them, say so. If you can answer them, do it.

The Witness: May I have an opportunity to read my previous testimony.

The Court: You may ask for your previous testimony any time you want it, but your task is to answer questions put to you. You may have a copy of your testimony if you want it. My statement is final. I do not speak to you again, because we are not going to have any unseemly

discussions. You are going to keep within your duties and Mr. Halle is going to keep within his.

By Mr. Halle:

X Q. Let me ask you this question: Do you remember of your own independent recollection what you are testifying to today?

A. Yes.

[fol. 48] X Q. And what you have stated today you say you remember as what happened?

A. The facts that happened three years ago.

X Q. I am asking you now if you remember now whether or not Callahan told you he was in Lunenberg? Answer me that question yes or no.

A. I will have to answer that question that he did not tell me in so many words that he was in Lunenberg. It might have been "We were in Lunenberg."

X Q. So you do not know; you would not state of your own knowledge from the conversation that you had with Callahan whether he was there or not?

A. No, only his inference by the word "we."

X Q. Does that not also apply to St. Pierre?

A. No.

X Q. You remember testifying before the recess, where you stated that the "we" referred to the same St. Pierre question?

A. I do not.

X Q. You do not remember that?

A. I did not say that.

X. Q. With what did Callahan tell you the boat was loaded?

A. He told me with 275 barrels of Scotch malt.

Mr. Halle: That is all.

The Court: Barrels?

The Witness: Small-sized barrels.

Redirect examination.

By Mr. Wales:

R. D. Q. Counsel for the defendant asked you in cross-examination about the use of the pronoun "we" by Callahan in his conversation with you, particularly as referring

to St. Pierre-Miquelon. I direct your attention to the [fol. 49] testimony given by you at the other hearing, found at pages 51 and 52 of the record?

Mr. Green: I do not see how these records—we had the privilege of asking him questions in contradiction.

Mr. Wales: It may be considered new matter, if it is any help.

The Court: I do not know what his question is going to be.

Mr. Green: He is starting to read this witness's testimony of a former question which was referred to as his memory.

The Court: I have to hear the whole question. Will you finish the question, Mr. Wales?

Mr. Wales: Will you repeat that, please.

(The question was repeated as follows: "Counsel for the defendant asked you on cross-examination about the use of the pronoun "we" by Callahan in his conversation with you, particularly as referring to St. Pierre-Miquelon. I direct your attention to something given by you at the other hearing, found at pages 51 and 52 of the record?")

R. D. Q. (continuing): "He said 'we then loaded 300 cases of malt and it took almost all day to load it, because if we put aboard 300 cases it would lose quite a little of her freeboard—that is, she would, that she would be deep in the water—and we had to take off some.' He might have said how many barrels of malt he had to take off to get a few more inches freeboard on her, but I am kind of hazy on that part. And he said, 'I loaded Charley aboard her there to pilot her into Delaware Capes.' He said, 'and also I stayed there that night of October 27th and saw [fol. 50] her leave at 6 o'clock on October 27th in the evening,' and he said 'so I doubled down here, come right down here and saw Hickman.' " Did you or not so testify?

Mr. Green: I object.

The Court: Upon what theory does it seem to you admissible, Mr. Wales?

Mr. Wales: My learned friend can consider this a recall.

The Court: Suppose it is a recall. Then, upon what theory is it admissible?

Mr. Wales: Counsel for the defendant by his examination of this witness has attempted to gain an admission

from this witness that by the use of the pronoun "we" there is grave doubt that this defendant Callahan was including himself at all in that description "we," whereas he used not only "we," but "I," in the course of that conversation of the night of November 3rd.

The Court: Still, I miss the theory upon which that testimony may be so used.

Mr. Wales: Simply this; Counsel for the defendant has picked out only such portions of the previous testimony of this witness as will serve his purpose to show that Callahan used the pronoun "we." He has not brought out that he also used "I" in the course of that conversation.

The Court: I will hear you, Mr. Green.

Mr. Green: If it please the Court, we asked this witness certain questions in contradiction of his other testimony, which we have a perfect right to do. Take his answers in [fol. 51] several ways: It is immaterial. That does not make admissible a recall by my friend so that he can read to him certain testimony and say "Did you not also say this? He can ask him further questions, but for him to take the testimony and say, "Did you not say this," is not permissible. In other words, the conduct of this whole trial could be, I could write down anything I please and say to the witness, "Did you say this?" In other words, it is an affirmative or a negative statement to something that I am asking him, putting everything into the witness's mouth, and that is not very good testimony.

The Court: My thought of it is this: That he should have asked him whether he did not make certain statements when he was on the stand before, and those statements deal with the same subject matter as the matter which Mr. Wales read, and the statements read by you do not tell the whole story. Mr. Wales may inquire as to whether he did not also make these additional statements, which might appear to be in qualification or modification of the statements asked of the witness before. If that is the foundation of fact for this question, I hold this question admissible; but in so far as the inquiries are directed to the witness's present testimony and not to what he testified to at previous hearings, then I see no basis for their admissibility. I will have to ask you a question of fact. Have you introduced part of his testimony from

the previous record which dealt with this same subject matter covered in part by Mr. Wales?

Mr. Green: Mr. Halle will have to answer that.

[fol. 52] Mr. Halle: What I did, your Honor, was to direct his attention to the statements that he made at the prior trial, to show contradictory testimony with reference to what he testified to this morning. I respectfully submit that if the witness would say now that he can not remember the incident, but that if he would read his testimony at the prior trial, it would refresh his recollection, then this would be admissible; that is, the witness could look at his testimony for the purpose of refreshing his recollection, but to read his testimony now and ask him if he testified so at the last trial, I respectfully submit is not competent.

The Court: You have not yet answered my question. If you have put in the present record a portion of his testimony given at the last trial, and the portion so introduced by you is not all of his testimony bearing upon that immediate matter, and the additional testimony not introduced by you modifies or qualifies in a measure that which was referred to by you, then I hold that it is admissible. Now, Mr. Wales said that this is in modification and qualification of what you presented in your cross-examination. If he is right on that, then I am prepared to rule.

Mr. Wales: Your Honor, I disagree with Mr. Halle, for this reason: I did not introduce the witness's testimony as to what he testified to at the last trial. I simply asked him did he make such statements at the last trial. I offered no testimony that this witness gave at the last trial.

The Court: I understand. Objection is overruled. Read the question and you may have an answer.

(Question repeated by the stenographer as follows: "R. D. Q. Counsel for the defendant asked you in cross-[fol. 53] examination about the use of the pronoun 'we' by Callahan in his conversation with you, particularly as referring to St. Pierre-Miquelon. I direct your attention to the testimony given by you at the other hearing, found on pages 51 and 52 of the record: He said 'we then loaded 300 cases of malt and it took almost all day to load it, because if we put aboard 300 cases it would lose quite a little of her freeboard—that is, she would, that she would be deep in the water—and we had to take off

some' he might have said how many barrels of malt he had to take off to get a few more inches freeboard on her, but I am kind of hazy on that part. And he said, 'I loaded Charley aboard her there to pilot her into Delaware Capes.' He said, 'and also I stayed there that night of October 27th and saw her leave at 6 o'clock on October 27th in the evening,' and he said, 'so I doubled down here, come right down here and saw Hickman.' " Did you or not so testify?

A. I did, sir, Mr. Wales, when I referred to "we."

Mr. Green: Just a minute. That is an answer.

The Court: That is a qualification of the previous answer.

Mr. Green: Did he say that or not; how can it be more than that?

The Court: Objection overruled.

A. (Continuing:) When I say "we," I inferred him to mean himself, Charley Newton and the man that is now dead, and a deaf and dumb man; and when he said "I," meaning they sailed on the boat; he stayed up there and doubled back down. That is the difference between the two: "we" before the liquor was on, and "I" after.

[fol. 54] By Mr. Wales:

R. D. Q. And have you given now in your testimony to the best of your recollection exactly what was said by Callahan on the evening of November 3rd, 1927?

A. I am quite sure I have.

Mr. Wales: That is all.

Mr. Halle: No further questions.

(Witness excused.)

KENNEDY L. HICKMAN

KENNEDY L. HICKMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. Where is your home, Mr. Hickman?

A. Cape May.

Q. And what is your business?
A. Fish and oil dock. It was, but I am peddling now.
Q. Where is your place of business?
A. Cape May.
Q. You mean the City of Cape May?
A. West Cape May, 131 Third Avenue.
Q. Where do you keep your merchandise, your stock?
A. In the garage.
Q. Please speak up?
A. Garage.
Q. Do you know where Skellinger's Landing is?
A. Yes, sir.
Q. Do you conduct business at that place?
A. Not any more.
Q. I mean in the fall of 1927?
[fol. 55] A. I was working there then.
Q. Do you remember the evening of November 3rd, 1927, and what took place?
A. Yes.
Q. Were you on that landing a little before 7 o'clock?
A. On the fish dock, oil dock.
Q. Is that Skellinger's Landing?
A. Skellinger's Landing.
Q. Did you see this defendant at that time?
A. Yes, sir.
Q. At that time how was he known to you, by what name?
A. Chic was *I* all I know.
Q. Well, he came to you that night before 7 o'clock?
A. I seen him down there, yes, sir.
Q. Did you have any conversation with him?
A. We stayed there and talked awhile, yes.
Q. What did you do that night with him?
A. Took him up to Gilhooley's.
Q. You mean the previous witness?
A. Yes.
Q. How did you take him there?
A. My car.
Q. What sort of a car was it?
A. It was a sedan, coach.
Q. Ford?
A. Ford, yes, sir.
Q. Where was he seated?
A. At the back seat.

Q. And who drove?
A. I did.
Q. Where was Gilhooley's home?
A. On a broad street—Perry Street.
Q. At that time?
A. At that time.
[fol. 56] Q. Did you find Gilhooley at home?
A. Yes, sir.
Q. Had there been any understanding previous to that night between you and Callahan about taking him there to Gilhooley's?
A. He wanted to meet him.
Q. What?
A. He wanted to meet him.
Q. Well then, you had seen him prior to the third of November about this matter?
A. Yes, sir.
Q. Or he had seen you?
A. Yes, sir.
Q. What, if any, understanding was there between Callahan and you about the name he was to be introduced by?
A. He told me to introduce him as Joseph Blake.
Q. As who?
A. Joe Blake.
Q. And do you know whether or not Gilhooley expected you on that evening?
A. Why he expected me up there some time. I do not know whether he expected me that particular evening or not.
Q. When you reached his place, what did you do?
A. I went in and called him out.
Q. And then what did you do?
A. I introduced him to Gilhooley.
Q. By what name did you introduce Gilhooley to the defendant, under the name of Blake?
A. Jordan.
Q. How did you come to do that?
A. Well, he was giving false names.
Q. Did you know in advance by what name you were going to introduce Gilhooley?
A. Not until that night.
Q. Well, how did you know then to use the name Jordan?
[fol. 57] Mr. Green: Just a moment. I think that is ob-

jected to, if it please the Court. That would necessarily be a conversation between Gilhooley and Hickman.

The Court: That is what I do not know. I do not know why he introduced him as Jordan, or selected Jordan as the particular alias that he was going to use for him that night. I will overrule the objection, with leave to renew.

Q. You knew Gilhooley was not Jordan?

A. Yes, sir.

Q. Then why was it you introduced Gilhooley as Jordan to the defendant?

A. He wanted to meet Jordan, and I introduced Gilhooley as Jordan.

Q. Then, do you know whether any conversation occurred between Gilhooley and Jordan?

A. Yes, sir.

Q. Where did they hold the conversation?

A. In the car, on the back seat.

Q. They stayed on the back seat?

A. Yes, sir.

Q. Where did you sit?

A. In the front seat, behind the steering wheel.

The Court: Mr. Wales, before you go into that, I have a poor understanding with respect to the introduction of Callahan and Gilhooley, as Jordan. I do not know whether there was a previous understanding with Gilhooley that he should be introduced to Callahan as Jordan or not? Was there?

The Witness: No, sir.

The Court: Then when you introduced Gilhooley to Callahan as Jordan, that was the first Gilhooley knew that he [fol. 58] was to be introduced to Callahan or Blake as Jordan?

The Witness: Yes, sir.

Mr. Wales: The witness, I understand, sir, has testified that Callahan wanted to meet Mr. Jordan. That is what he so testified.

By Mr. Wales:

Q. You knew who Mr. Jordan was, did you not?

A. Yes, sir.

Q. Who was he?

A. He was an officer at Base 9.

Q. You knew who Gilhooley was?

A. Yes, sir.

Q. At that time you knew he was connected with the Coast Guard, did you not?

A. Yes, sir.

Q. Then the conversation started in between Gilhooley and Blake while you were sitting on the front seat and they were sitting on the back seat?

A. Yes, sir; they were talking.

Q. Did you hear any part of that conversation?

A. I heard some of it.

Q. State what, if anything, you heard Callahan say in regard to the schooner "Charles Edward."

A. About it being loaded and on the way up?

Q. Will you repeat that?

A. He was telling him about it being loaded and on the way up.

Q. Did he say where it was coming from?

A. Delaware Bay.

Q. I mean, from what point it had sailed, do you remember that?

A. I did not hear that.

Q. What, if anything, did you hear Callahan say to Gilhooley about money?

[fol. 59] A. I heard him mention five grand.

Q. In what connection was that made?

A. Why, if he went through the bay.

Q. He went through the bay?

A. The schooner "Charles Edward."

Q. And what was this five grand to be paid Gilhooley for?

A. For making an opening so that he could come through.

Q. Making an opening in what?

A. The Coast Guard.

Q. An opening in the patrol, you mean?

A. Patrol; yes, sir.

Q. Did you hear what Gilhooley said to Callahan in reply to that proposition?

A. Why, he said he would take care of it.

Q. He would do what?

A. He would take care of it.

Q. Did he or not in the course of that conversation say to Callahan that he would do what he could for him?

Mr. Green: I object.

The Court: Sustained.

Q. Do you recall any other parts of the conversation in regard to the schooner "Charles Edward"?

A. No.

Q. What, if anything, did you hear Callahan say about his having returned from Canada?

A. He said he got back.

Q. Do you remember he said that?

A. I remember he said that, yes.

Q. Do you remember what, if anything, he said about the schooner being at Pierre-Miquelon?

A. No.

Q. You do not remember that?

A. No.

[fol. 60] Q. About how long did the conversation take?

A. A half hour to three-quarters, I imagine.

Q. And after it was over, where did you go?

A. I took Callahan back to the dock, and I went home.

Q. Mr. Hickman, you did not appear here as a witness in a previous hearing?

A. No, sir; I was sick.

Mr. Green: I object to that as immaterial. What difference does it make whether he was or not?

The Court: I overrule the objection.

Mr. Green: I do not seriously object.

Cross-examination.

By Mr. Halle:

X Q. Mr. Hickman, you say you are in the oil business?

A. Yes, sir.

X Q. And you knew Callahan for how long?

A. I did not know him long before I met him down there. I had seen him several times.

X Q. Callahan told you he wanted to meet a Mr. Jordan?

A. Yes, sir.

X Q. So you took him to Gilhooley?

A. Absolutely.

X Q. And without any forewarning to Gilhooley, or without saying anything to Gilhooley, you introduced Callahan to Gilhooley as Mr. Jordan; right?

A. Yes.

X Q. Had you known Mr. Jordan?

A. Yes.

X Q. To talk to?

A. Yes, sir.

[fol. 61] X Q. Had you spoken to him before—Jordan?

A. Yes.

X Q. Did you hear Gilhooley testify on the witness stand here today?

A. Yes.

X Q Did you hear him say that it was understood from previous conversations with you that you were to introduce Gilhooley as Jordan to Callahan? Did you hear Gilhooley testify to that this morning?

A. Yes.

X Q. He is in error about that, is he not?

A. (No response.)

X Q. In other words, you had no such understanding with Gilhooley?

A. No.

X Q. So when Gilhooley said you had this understanding, he is in error so far as you recollect?

A. As far as I recollect.

X Q. You were sitting in this car?

A. Yes.

X Q. And it was not hard to hear what was going on in that car?

A. I was not paying much attention to it.

X Q. Just answer my question. It was not very difficult to hear people talking in that car?

A. No.

X Q. It was a quiet place where this car was parked? This car was parked on a street where there were not very many noises; am I right in that?

A. Yes.

X Q. It was quiet?

A. Yes.

X Q. And you were sitting in the front seat?

A. Yes.

X Q. And where was Callahan sitting?
A. Back.
X Q. And where was Gilhooley?
[fol. 62] A. Back.
X Q. And did you hear the whole conversation going on?
A. Well, they talked about several things.
X Q. What is that?
A. They were talking over several things.
X Q. Do you remember what they were talking about?
A. I did not pay much attention to them.
X Q. You were not interested to know what Callahan wanted to see Jordan for, were you?
A. No.
X Q. Nor did you care what he wanted to see Jordan for?
A. It did not make much difference to me.
X Q. Nor did you know before you started out what Callahan wanted to see Jordan for?
A. Yes.
X Q. You did know?
A. Yes.
X Q. From talks with Callahan?
A. Yes, sir.
X Q. You mean Callahan prior to that day told you that he wanted to meet Jordan?
A. How is that?
X Q. You mean to say that prior to November 3d Callahan told you he wanted to meet Jordan?
A. Yes, sir.
X Q. And he told you what for?
A. Yes.
X Q. And without saying anything to anyone, you brought him to Gilhooley?
A. Yes.
X Q. And Gilhooley told Callahan that he would take care of the thing?
A. Yes, he would take care of it.
[fol. 63] X Q. Gilhooley did not recall the other two officers out that were in his home that night?
A. No.
X Q. He did not make any attempt to call them out, did he?
A. Not while I was there.

X Q. Well, you were there the entire time; you brought Callahan there and you took him away?

A. Yes.

X Q. And you were present at all times in the car?

A. Yes.

X Q. And in your presence and during this entire time the other two officers were not called out by Gilhooley?

A. No.

Mr. Halle: That is all.

Redirect examination.

By Mr. Wales:

R. D. Q. Mr. Hickman, do you know whether Callahan knew Mr. Jordan at that time?

A. I do not.

R. D. Q. You do remember that night these two other officers being at Hickman's house, do you, Osterberg and Lloyd?

A. I did not know they were there.

R. D. Q. You did not know they were there?

A. No, sir. He said he had company, but I did not know who the company was.

R. D. Q. They did not come out of the house?

A. No, sir.

(Witness excused.)

[fol. 64] JOEL A. OSTERBERG

JOEL A. OSTERBERG, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. Before the 10th of November, 1927, and subsequent thereto, what position, if any, did you hold under the United States Government?

A. I was a warrant officer in the United States Coast Guard at Base 9, Cape May, New Jersey.

Q. At that time what were your duties?

A. I was also in charge of Patrol Boat "C. G. 113," attached to that base.

Q. Do you recall the evening of the 10th of November, 1927?

A. Yes, sir.

Q. Where were you early in the evening of that day?

A. I was on patrol at lower Delaware Bay between Cape Henlopen and Cape May.

Q. What particular duty, if any, were you charged to perform at that time?

Mr. Green: I object to that as immaterial. I do not care what his particular duty was. What did he actually do, that is the only thing we are interested in here.

The Court: I think that is a proper question, to show that he was in the discharge of his duty, to show what the duties of the coast guard consisted of.

Mr. Green: I think this question is rather open in that respect, what his particular duty was at this time.

[fol. 65] The Court: I think he can show what his duties were, and if he was in the performance of his duties or not. Overruled.

Mr. Wales: Will you repeat the question?

(Question repeated as follows: "What particular duty, if any, were you charged to perform at that time?")

A. My duties were to assist in the saving of lives and property at sea, and to be on the lookout for any contraband being smuggled into the United States, any contraband cargoes of any kind; to board all vessels coming in that might be suspected of carrying such contraband.

Q. Were you or not on the lookout for any particular vessel that evening?

A. Yes, sir, we had had specific orders——

Mr. Green: That is just what I object to. I submit that is immaterial.

The Court: I think that is immaterial, as to what he did with regard to this particular vessel, whether he had any previous notice would be wholly immaterial, I think.

Q. Prior to that night, what, if any, instructions had been given to you in connection with a schooner known as the "Charles Edward"?

Mr. Green: I object, if your Honor please.

The Court: On what theory does that seem admissible to you, Mr. Wales?

Mr. Wales: If any instructions had been given to this witness that a certain vessel was supposed to be on its way into the Delaware Capes with a load of contraband liquor [fol. 66] on it, and he was to be on the watch for that boat, and intercept it, I certainly think we are entitled to know that fact.

The Court: No. Why and wherein would it be admissible against this defendant, whether he had information or orders he had received prior to that time, without our knowing anything about where they came from, or whether connected with Callahan at all. I do not see how it would be admissible against Callahan. If it has any pertinency at all, it would be to add weight to your charge against Callahan. Now, why would it be admissible as against him?

Mr. Wales: Let us see what is already in evidence. By Callahan's admission, he had gone to Canada and had bought this boat, the schooner "Charles Edward," had stepped it off to see what it could do, it made so many knots, and then "we had then sailed, after being outfitted, from Lunenberg to St. Pierre-Miquelon, where it was loaded with this cargo of liquor." That he personally had left the pilot on board to pilot her through the Delaware Capes, and that he saw the boat sail on the evening of October 7th. He told Gilhooley that the boat would be due soon, would shortly be due.

Mr. Green: That night or the next morning?

Mr. Wales: There was a storm coming up at that time, because he said, "Now, see what we are up against." Now, Gilhooley reported that incident and it seems to me that connects the defendant pretty closely with the schooner "Charles Edward" and with what she was loaded, and what her destination was to be. Now, in logical sequence, if we can show by this witness, that he had been instructed while on duty to look for the schooner known as "Charles Ed- [fol. 67] ward," it is certainly pertinent, I take it, in the

case. Having already connected Callahan with that schooner it does not seem to me illogical at all to——

The Court: I do not get the connection, Mr. Wales. You may be right, but I do not see it. I sustain the objection.

By Mr. Wales:

Q. When did you go on duty on the 10th of November?

A. On the morning of the 10th, that same day.

Q. And how long did you remain on duty?

A. I was on duty until the "Charles Edward" was completely discharged of her cargo.

Q. What was the "Charles Edward"?

A. Canadian two-masted auxiliary schooner.

Q. Did you notice her on the evening of that day?

A. Yes, sir.

Q. While you were on patrol duty?

A. Yes, sir.

Q. Where was this schooner when you first saw her?

A. Coming up Delaware Bay from a general direction of Overfalls Light Vessel.

Q. About how far past the light between the two capes?

A. About four miles inside, when I first saw her.

Q. And how near the coast line of Delaware?

A. I should say less than four miles.

Q. Which side was this vessel on at that time with reference to the middle line between Delaware and New Jersey?

A. Well, on the Delaware side.

Q. How did you come to notice this boat for the first time?

[fol. 68] A. Another boat had already seen it. Well, first I saw it and proceeded to chase it, and the other boat at the breakwater also saw it and he started there too, but I got there first and I got aboard of her first.

Q. Was any order given to the boat before you boarded it?

A. I did not quite get that question.

Q. Was the boat still under headway when you caught it or was it still?

A. It was still under way with motor and sail.

Q. Had you given the boat any order to heave to?

A. Yes, sir.

Q. And the order was obeyed?

A. Yes, sir.

Q. Well, then, when you came alongside, what did you do?

A. I came alongside and I sent my chief boatswain's mate on board.

Q. Never mind what he said, but only what you know he did. What did he do, if you know?

A. He went on board and informed the master that he was to board the vessel.

Mr. Green: Now, just a minute, please.

The Court: He went on board. You do not know what he did to your knowledge after that? Did you hear what he said?

The Witness: Yes, sir.

The Court: All right.

Mr. Green: He informed the master that he was aboard. May I interrupt there? Did you hear your boatswain say this to the captain of this other boat?

The Witness: Yes.

Mr. Green: How could you hear that?

[fol. 69] The Witness: Because I was right alongside the vessel. I was just six feet away. He informed the master of that vessel that he was representing the United States Coast Guard, and he was on there to search the vessel because it was a foreign vessel, and the captain of the "Charles Edward" immediately gave him a slip with a heading of Great West Wine Company, and he said, "This is the cargo I have aboard." The chief boatswain's mate immediately came back on board and I turned the vessel over to him and went aboard the "Charles Edward" myself with two or three men. I do not remember whether it was three now or two, and took charge of the vessel and the papers of the ship.

The Court: The court will be recessed until 2:15 o'clock.

After Recess

By Mr. Wales:

Q. Before recess you were asked when you boarded the schooner "Charles Edward." When did you board her?

A. I boarded her at 9:20 P. M. on the night of November 10th, 1927.

Q. Well, how soon after it had been intercepted and ordered to heave to?

A. About ten or fifteen minutes, I should say.

Q. When you boarded the vessel what did you do?

A. My chief boatswain's mate went aboard first and notified him that he was representing the United States Coast Guard and that he was aboard for the purpose of examining the vessel, and he was in turn given a slip of paper telling what cargo the vessel had, which he brought back aboard my boat and gave to me. Then I in turn went [fol. 70] aboard the "Charles Edward" with the prize crew and left the chief in charge of the vessel.

Q. Well, who demanded the ship's papers, if any one?

A. I did.

Q. And when did you do that?

A. Immediately upon my going aboard.

Q. From whom did you receive the ship's papers?

A. From the master of the vessel.

Q. What was his name?

A. Albert Knickle,

Q. Please examine this paper marked "Government's Exhibit D for Identification," and state whether or not that was among the papers?

A. That was the paper that was handed to my chief boatswain's mate, and he in turn gave it to me when I went aboard. That was the first paper I got.

Q. Please examine the paper marked "Government's Exhibit B for identification"?

A. Yes, sir; that paper was amongst the ship's papers.

Q. Please examine the paper marked "Government's Exhibit C for Identification"?

A. Yes, sir; these were the ship's documents. I remember getting them.

Q. Examine "Government's Exhibit A for Identification"?

A. Yes, sir; the manifest of the cargo.

Q. Please examine this paper which is not marked and state whether that was not one of them?

A. Yes, sir; it was.

Mr. Wales: I ask that this be marked for identification.

(Paper received and marked "Government's Exhibit E for Identification.")

[fol. 71] Q. And examine this paper which has not as yet been marked.

A. Yes, sir; the ship's articles; I remember that paper.

Mr. Wales: I ask that this be marked for identification.

(Paper received and marked "Government's Exhibit F for Identification.")

Q. To whom were those papers subsequently delivered?

A. To the customs agent in charge, Mr. Green.

Q. Joseph L. Green?

A. Yes, sir.

Q. When?

A. On the morning of November 11th, when he came on board.

Q. And from the evening of November 10th until the morning of the 11th, in whose possession did they remain?

A. In my sole possession.

Q. In your personal possession?

A. Yes, sir.

Q. Were there or not any other papers, Mr. Osterberg, that were turned over to you by the master of the vessel at that time?

A. There were some charts and a mariner's note book turned over also; several charts; I do not recall how many, but there were some charts.

Q. Several charts and a mariner's note book?

A. Yes.

Q. Which were also delivered to Mr. Green?

A. Yes, sir.

Q. How long did you remain on the schooner "Charles Edward"?

A. Until, I believe, it was five days later; I am not sure, but I believe it was five or six days later when the vessel [fol. 72] finished discharging her cargo in Philadelphia.

Q. Well, where was the boat taken?

A. It was first taken to the Marine Terminal Docks in Wilmington.

Q. In this state and district?

A. In this city; yes, sir.

Q. And what was done there?

A. The seven persons were brought up to the Federal Building and were arraigned and afterwards I had orders from Base 9 to wait for another——

Mr. Green: I object.

The Court: Yes, what did you do?

The Witness: I took the vessel to Philadelphia from Wilmington.

Q. The vessel was in your charge?

A. Yes, sir.

Q. And do you know when it arrived in Philadelphia?

A. On the night of November 12th, if I am not mistaken, about 10 P. M.

Q. Were you there when its cargo was discharged?

A. Yes, sir.

Q. Did you see it discharged?

A. Yes, sir.

Q. Where was that done?

A. That was done at the Erickson Line Docks in Philadelphia where the coast guard harbor cutter ties up, the Guthrie, at the foot of Market Street.

Q. When you saw the cargo unloaded, did you check up the articles that were unloaded?

A. I did tally the articles that were unloaded.

Q. Please state how many kegs of Islay Malt were unloaded?

[fol. 73] Mr. Green: I object to that. I do not mind him stating what was unloaded, but he is asking him how many, naming what was unloaded. I think it is leading. Let him state what was unloaded.

The Court: You may use the paper to refresh your recollection, and then state what was unloaded.

Q. This paper you have already identified as among the ship's papers?

A. Yes, sir.

Q. How did the articles set forth in the list compare with the articles which you saw unloaded from this boat at Philadelphia?

A. There were 275 kegs; that was correct with my check, and there were over 100 cases of every sort of liquors, the

exact amount I do not remember now, but I do remember 275 kegs of malt.

Q. And over 100 of assorted liquors in addition?

A. Yes, sir.

Q. If you know, how many patrol vessels were on guard on the evening of November 10th?

A. On the evening of November 10th there were three vessels on guard in the entrance. I was on the third vessel, which was a new patrol. Previously they only had two vessels in charge, but I had orders to go out and stay in the red sector of the Brandywine Light without lights, and to be on the lookout for this vessel. Those were my orders when I left that morning. It was a special patrol.

Mr. Wales: Cross-examine.

Cross-examination

By Mr. Halle:

X Q. What kind of a night was this?

A. It was a bright moonlight night with a very light breeze blowing.

[fol. 74] X Q. And could you see land from where you were?

A. I could see the outline; yes, sir.

X Q. And just where were you stationed that night?

A. I was about in the middle between the two capes, Cape Henlopen and Cape May, at Great South Shoals.

X Q. I show you this chart. Will you put a mark on that chart just where you were stationed?

A. Yes, sir. My patrol was like this (indicating). This was the area of my patrol.

X Q. Will you mark that line that you call the area of your patrol by an X mark?

A. (Witness marks chart as directed.)

X Q. Now, you did not take the measurements of your distances; you were in that vicinity?

A. Yes, sir; I was in that vicinity.

X Q. And you might have been more or less out of that line; may be a mile or two out of the way?

A. No, sir; I was a very little distance to the right of the red sector. I just had been at the white sector a few minutes previous, and got into the red sector again.

X Q. What do you mean by the red sector?

A. This is the red sector of Brandywine (indicating). This dotted line down here indicates the red sector (indicating).

X Q. That is on the New Jersey side?

A. That is on the Delaware side; the red sector is on the Jersey side.

X Q. That is what I am asking you.

A. That is right.

X Q. And you were on the right side of the red sector?

A. Not to the right of this red sector.

X Q. And that would put you on the Jersey side, would it not?

[fol. 75] A. No, the light shows on the Jersey side; the red sector shows to the Jersey side, towards it, but not in the Jersey side.

X Q. Well, you are looking at this map; maybe I do not understand you. When you are looking at this map, your right hand is on the Jersey side.

A. Yes.

X Q. And when you say you were to the right, you mean that you were on the Jersey side?

A. Why, I said that the light was showing towards the Jersey side.

X Q. I mean your boat.

A. I was in the red sector, but I was not on the Jersey side. I was in the middle. The light shows towards Jersey, that is what I mean. It is not in the Jersey waters. I did not mean exactly that.

X Q. And what did you say about Brandywine?

A. I was in the red sector patrolling, and previously I had just come out of the red sector, like up in here, into the white sector, turned around and came back down again, when I sighted the "Charles Edward."

X Q. And where was the "Charles Edward" when you first sighted her?

A. Coming up about four miles, I should say right in about here, where my thumb is (indicating).

X Q. Will you mark with an "E," please.

A. (Witness marks chart as directed.)

X Q. Now, you did not take any observations or sights, did you, at the time?

A. Yes, sir.

X Q. You did?

A. Yes.

X Q. And what did your observations disclose to you?

A. I took three bearings, one of Cape May light, one of Delaware Breakwater, and one of Overfalls Light Vessel, [fol. 76] the result of which is marked on that chart in the small triangle.

X Q. So when you first observed the "Charles Edward" it was at the place where you marked it with an "E" on this chart?

A. Approximately; yes, sir.

X Q. And can you tell us how many miles away that is from Cape Henlopen?

A. From Cape Henlopen?

X Q. Yes. I will give you a pair of dividers, and that will help you.

A. (Measuring chart): Approximately three miles from Cape Henlopen, inside.

X Q. Well, that marking, you would not call that exact; you would call that approximate?

A. Approximate.

X Q. It might be more, it might be less?

A. It might be less.

X Q. And how much more or less you could not tell, could you?

A. Well, not exactly; no, sir.

X Q. And do you think I ought to show it to the jury so that they will be able to look at it?

The Court: Do you offer it in evidence, or do you want it marked for identification? Have you any objection to the jury seeing it?

Mr. Wales: None whatever. I would be glad to have them see it.

The Court: Then show it to the jury.

Mr. Wales (Showing map to jury and explaining same to them): This is the line which the witness says he was patrolling up and down, between the two X marks. This is the letter "E," where he said he first observed the "Charles Edward" more or less.

[fol. 77] Juror No. 1: What line is this X here (indicating)?

Mr. Halle: I will ask the witness that.

By Mr. Ralle:

X Q. The jury wants to know what this red dotted line is here.

A. That is the cable area between the two Capes, and you are not supposed to anchor in that area.

X Q. How wide are those two points? I mean the body of water between Cape Henlopen and Cape May?

A. Approximately ten miles; almost exactly ten miles.

X Q. Now, just where were you on this line of patrol between the two "X" marks, or as near as you can tell the Court and jury when you first observed the "Charles Edward"?

A. I was right about here (indicating), because I sighted her to the southward.

X Q. About how far away did you say the boat was?

A. Oh, almost two miles.

X Q. And from where you were you just about could make out the outline of land?

A. Yes, sir.

X Q. Which land, the Cape May side or the Henlopen side?

A. I could see the sand dunes of Cape Henlopen, and also I could see the Delaware Breakwater.

X Q. About how far a distance could you see that night? Give us your best judgment.

A. Why, about—the visibility was about eight miles, I should say, for a prominent object.

X Q. And on the Cape May side what were you able to see?

[fol. 78] A. Only the lights. I never took particular notice that I could see the land, but I could see the Henlopen sand dunes.

X Q. In other words, you were able to see Cape Henlopen much better than Cape May?

A. Yes, sir.

X Q. Well, just mark the space where you say your boat was about when you first sighted the "Charles Edward." Just mark it and call it "C. G."

A. (Witness marks chart as instructed.)

X Q. Now, I want you to look at the chart. Take these dividers and tell us if you were not nearer Cape May at the time than you were to Cape Henlopen?

A. Yes, I was.

X Q. About how many miles nearer to Cape May were you than to Cape Henlopen?

A. About half a mile.

X Q. And yet you say you could not see Cape May as well as you could see Cape Henlopen?

A. No, sir, because Cape May is low land and Cape Henlopen has very high sand dunes.

X Q. About how high?

A. Oh, I should say it is over 100 feet high.

X Q. Cape May is not there. How high above the water is that?

A. Oh, about fifteen or twenty feet at the most.

X Q. If you had good visibility and it was a nice moonlight night and your visibility was eight miles, you should have been able to see Cape May?

A. Probably I could, yes, sir, if I had taken particular notice of it.

X Q. When you observed the "Charles Edward" did you see the name on the boat?

A. When I put my light on, yes, sir.

X Q. You mean, two miles away?

A. No, sir; when I put my light on the boat when I was right under the stern.

[fol. 79] X Q. In other words, when you first observed the "Charles Edward" you did not know what boat that was?

A. Not at the time; no, sir.

X Q. It was only when you got close by that you first found out the boat was the "Charles Edward"?

A. Yes, sir.

X Q. And was the defendant Callahan on the boat?

A. No, sir; not that I know of.

X Q. Well, did you see him there?

A. No, sir; I never seen the man before the last trial.

X Q. And no persons escaped you, did they?

A. No, sir.

X Q. Now, I just want to ask you this: You say your boatswain was sent by you to go aboard the "Charles Edward" for the papers?

A. No, sir; he was sent aboard to see what her cargo was, to board her.

X Q. And you got these papers from your boatswain?

A. No, sir; only that one of the Great West Wine Company, with the cargo; that was the only one he brought.

X Q. And the rest of the papers marked for identification "Government's Exhibits A, B, C, D, E and F," did you get those papers?

A. Yes, sir.

X Q. And where did you get them from?

A. From the master of the "Charles Edward."

X Q. You personally did?

A. Yes, sir.

X Q. What is the exact name of this boat, do you know?

A. Yes, sir; "Charles Edward."

Mr. Halle: That is all.

[fol. 80] Redirect examination.

By Mr. Wales:

R. D. Q. Mr. Osterberg, did you see from what source your boatswain obtained this cargo list?

A. Yes, sir; from the master of the "Charles Edward."

R. D. Q. You saw the master hand it to the boatswain?

A. Yes, sir; I was right alongside the vessel.

R. D. Q. After you sighted the schooner "Charles Edward," state, if you know, how far she traveled before she was ordered to heave to and obey the order?

A. I should judge about a mile.

R. D. Q. During that distance, what, if any, change in her course was there from the time you first saw her? How was she headed when you first saw her?

A. She was still heading on a northerly course.

R. D. Q. Towards or away from the coast line of Delaware?

A. Away from.

R. D. Q. At the time she hove to, state whether or not she was then on the Delaware or the New Jersey side of the middle line of Delaware Bay.

A. She was still on the Delaware line.

Mr. Halle: Is that all?

Mr. Wales: Yes.

Recross-examination.

By Mr. Halle:

R. X. Q. You would not be positive about that, would you? This was your impression; is not that so?

A. According to the sights I took she was, yes, sir; absolutely positive according to the compass bearings.

R. X. Q. When did you take those sights?

A. I took those sights at about quarter to ten, after the vessel had anchored.

[fol. 81] R. X. Q. How long a period of time did the Edwards boat run towards the Jersey side before you brought her to a stop?

A. About ten or fifteen minutes.

R. X. Q. And how fast was the boat going?

A. About six knots.

R. X. Q. Six knots?

A. Yes, sir.

R. X. Q. In other words, she might have made more than a mile during that time?

A. Well, she might have.

R. X. Q. How fast were you going?

A. I was going about sixteen or seventeen.

R. X. Q. Knots?

A. Until I got close. Sixteen or seventeen miles; about fifteen knots I was going.

R. X. Q. A knot is a mile and one-sixth?

A. A mile and one-eighth.

R. X. Q. And how long did it take you to reach the "Edwards" boat?

A. Oh, just about—I had my line on her in about six minutes after I sighted her—six or eight minutes.

R. X. Q. Were you by her side in six or eight minutes?

A. I was around to her stern.

R. X. Q. How do you account for the "Edwards" boat running fifteen minutes?

A. Because I was still trailing her and she was still under way. She had her sails up and she was still under way until she was anchored.

Redirect examination.

By Mr. Wales:

R. D. Q. Will you mark on the map the position of the "Charles Edward" when you actually overhauled her and made her heave to? You indicated the first by a "C." Will you indicate the next by a "C_2."

[fol. 82] A. When I got aboard she was approximately in the same position after she lowered her sail.

R. D. Q. She was a mile further on?

A. Than when I first saw her.

R. D. Q. Is that the point where you marked that with a "C_2"?

A. Yes, sir.

Recross-examination.

By Mr. Halle:

R. X. Q. Was there a Coast Guard vessel convoying the "Edwards" boat that night?

A. No, sir.

R. X. Q. Were any Coast Guard officials on the "Edwards" boat?

A. No, sir.

R. X. Q. She was all by herself?

A. Yes, sir.

R. X. Q. Without a convoy?

A. Yes, sir.

(Witness excused.)

JOSEPH L. GREEN

JOSEPH L. GREEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. Mr. Green, prior to the 10th of November, 1927, as well as subsequent thereto, what, if any, position did you hold under the United States Government?

A. I was Customs Agent in charge at Philadelphia.

Q. Did you see the schooner "Charles Edward" on or about the 11th of November, 1927?

[fol. 83] A. I did; yes, sir.

Q. Did you board that boat?

A. I did.

Q. And who, if any one, was with you at that time?

A. Mr. Sterner accompanied me.

Q. Any one else?

A. The vessel was under seizure by the Coast Guard. Coast Guard officials were present there.

Q. Who were present of the Coast Guard?

A. Mr. Gilhooley, Mr. Osterberg, Mr. Jordan and Mr. Desses.

Q. What time of the morning of November 11th was it?

A. I should say about nine o'clock in the morning.

Q. What was your purpose there at that time?

A. To take over the vessel from the Coast Guard; that is, the seizure of the vessel and her cargo, and to interview the crew with the purpose of establishing the ownership of the vessel and cargo.

Q. Did you see the hatches of the vessel when you boarded it, sealed or unsealed?

A. They were sealed at the time I boarded it.

Q. Do you know what the seal was on the hatch?

A. I cannot recall the inscription on the seal. I recall that these hatches were sealed with a lead seal and there was some fine inscription on it.

Q. Was it or not any seal of the United States?

A. It was not a seal of the United States.

Q. Did you see the seals broken?

A. I personally broke one myself to take out some samples as exhibits.

Q. After the seals were broken did you observe what the cargo consisted of?

A. It was labeled intoxicating liquors of various kinds.

Q. Was there, so far as you observed at that time, any thing else but assorted liquor on that boat?

[fol. 84] A. There was not room for anything else.

Q. And then did you subsequently obtain possession of the ship's papers?

A. I did; yes, sir.

Q. From whom did you receive them?

A. From Mr. Osterberg.

Q. Will you please examine these various papers and state whether or not you recognize them as the ones so delivered to you?

A. I do. I identify each one of these exhibits as being a document delivered to me that day.

Q. And who has had possession of these papers since that time?

A. They have been in possession of the customs agent at Philadelphia.

Q. You were then in charge?

A. I was then in charge; yes, sir. Upon my departure, I turned them over to Mr. Sterner.

Q. You are not now stationed at Philadelphia?

A. I am not; no, sir.

Q. Where are you stationed?

A. Pembina, North Dakota.

Q. Before leaving for your present station, do you know to whom these papers were delivered for safe keeping?

A. They were delivered to Mr. Sterner, the customs agent.

Q. Were there any other papers to your knowledge, Mr. Green, delivered to you by Osterberg as part of the ship's papers, which are not among those now accepted?

A. There were; yes, sir.

Q. What were they?

A. There were a number of charts indicating the course of the vessel on her voyage.

[fol. 85] Mr. Green: I object to that. I do not mind the number of charts, but what they indicated. It is for us to ask.

The Court: That is all right, because it is not prejudicial so far.

Q. What other papers that you recall besides the charts?

A. A mariner's note book of some kind or other, indicating daily——

Mr. Green: I object to that, what it indicates.

The Court: You can not tell what is in the note book.

Mr. Green: It will speak for itself.

Q. Do you know, Mr. Green, where those other papers are at this time?

A. I do not know.

Q. So far as you know they have been lost or mislaid?

A. So far as I know, they have been.

Q. You have not been able to find them?

A. I have not. I have made an attempt to locate them.

Q. The schooner "Charles Edward," if you know, was taken away after it was seized?

A. She proceeded first to Wilmington, Delaware, to the Marine Terminal, and the members of the crew, including the master, were arraigned before a justice of the peace here.

Q. Where was it finally taken?

A. To Philadelphia, Pennsylvania.

Q. Were you present when its cargo was unloaded?

A. I was; yes, sir.

Q. Did you see what was the nature of that cargo?

A. I did.

[fol. 86] Q. What did it consist of?

A. Intoxicating liquors.

Q. Will you state from reading the list of liquor mentioned there in that paper marked "Government's Exhibit D for Identification," the cargo unloaded, as compared with the cargo mentioned in that list?

A. If I refer to the seizure report, I will be able to.

Mr. Green: If the Court please, that is very improper. Here is a paper not in evidence, to start with, which is handed to the witness. Not being in evidence, I do not believe he has any right to do it, and now he is asking him for a comparison of some memorandum without the paper being in evidence.

The Court: The question in substance, as I understand it, is such that he may use a certain document to refresh his recollection. The witness, however, has said that he wants to use another document for the purpose of refreshing his recollection.

Mr. Green: We do not want to object to that.

The Witness: My answer must be from my memory?

The Court: What we want to know is what the cargo consisted of.

Mr. Wales: He has answered that it consisted of assorted liquors, as I understand it, and I asked if he was there when it was unloaded and how the articles mentioned in this list——

Mr. Green: That is what I objected to. The paper is not in evidence. If any comparison is to be made, it is to be made by the jury.

[fol. 87] The Court: I think you may show what was there and then you may make your comparison, but I think the witness may not under the present circumstances.

Q. Well, will you state, Mr. Green, from having been there and seen the cargo unloaded, as well as you can, what different kinds of liquor were unloaded from that boat?

The Court: And the quantity.

Q. And the quantity?

A. At first I may say there is 275 kegs of Islay Scotch Malt and 132 cases of the various liquors. I recall from my memory that there was a bit of Booth's High and Dry Gin, peach brandy, and that is all that I recall just now.

Q. Any sparkling burgundy?

A. I do not recall that.

Q. Any creme de menthe?

Mr. Green: I object. That is very leading. Let the witness say what he found and there will be no objection.

The Court: Well, he may make the inquiry for the purpose of aiding his memory. Will you answer the last question?

A. I do not recall any creme de menthe.

Q. Well, you have no distinct recollection about what actually composed the assorted liquors?

A. In the main, it was gin; that is my recollection.

Q. High and Dry Gin?

A. Booth's High and Dry Gin.

Q. Did you notice whether any name appeared on those kegs to which you have testified, and how the name was marked on the kegs?

[fol. 88] A. There was marking on the kegs but I can not remember; it is so long ago.

Q. It was not a paper label?

A. There were no paper labels observed. There was a name burned into the head of the keg, but I do not recall the name.

Q. Did you observe whether the bottles or the labels on the bottles indicated whether they were of American or foreign origin?

Mr. Green: I object. It is not material. The Circuit Court has ruled in the Parillo case that markings have absolutely no evidential value at all.

Mr. Wales: It is not controlling, it is true, but here is such a continuous—you might say continuous possession or continuous connection between this cargo and the boat, it could

not very well have gotten out of the boat to have the labels changed that were on there.

The Court: I do not know the case.

Mr. Green: Parillo v. the United States, in 299 Fed., 417. I have read the case. More than that, this question is leading, asking him "Did you notice"—I do not want to repeat it, but if your Honor please, the question is very leading. I do not find him saying what were the labels on it. When he asks more than that, I think it is objectionable.

The Court: Well, do you withdraw your objection?

Mr. Green: I withdraw on the other basis, but still object on the ground it is leading.

The Court: Mr. Wales, the objection is withdrawn and it is consented that you may inquire as to what these labels [fol. 89] were, but not in a leading way.

By Mr. Wales:

Q. Did you notice, Mr. Green, any labels on the bottles forming part of this cargo?

A. I did; yes, sir.

Q. Do you remember how any of those labels read?

A. The gin was labeled "Booth's High and Dry Gin." It was a foreign label. I do not remember whether it was London.

Q. It was a foreign label?

A. Yes, sir; it was a foreign label.

Q. Do you remember any of the other labels?

A. I recall the brandy, peach brandy. It was in a peculiarly shaped bottle. It was with a foreign label; in fact, all the bottles examined were labeled, and they all bore foreign labels that I examined.

Mr. Wales: Cross-examine.

Mr. Halle: No questions.

(Witness excused.)

CHESTER L. JORDAN

CHESTER L. JORDAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. Mr. Jordan, on or before the tenth of November, 1927,

and subsequent thereto, what position, if any, did you hold under the United States Government?

A. Executive officer, Section Base 9, Cape May, New Jersey, of the United States Coast Guard.

[fol. 90] Q. Where were you on the morning of November 11th, 1927, about 9 o'clock?

A. I boarded the schooner "Charles Edward" at anchor in Delaware Bay.

Q. What was the purpose of your being there at that time?

A. To identify, if possible, any members of the crew, inspect her papers.

Q. Did you board the vessel at that time?

A. I boarded her; yes, sir.

Q. Did you notice any one in the crew whom you knew personally by the name of Charles Newton?

A. I did; yes, sir.

Q. If you know, what other name was he known by at that time?

A. Charles Brown.

Q. Charles R. Brown?

A. Charles R. Brown.

Q. Are you a navigator, Mr. Jordan?

A. I am a licensed navigator; yes, sir.

Q. After the seizure of the "Charles Edward" did you examine the ship's papers.

A. I went through all the papers that are in evidence and paid particular attention to her charts and navigational data and work books.

Q. Did you, from the examination of the charts and ship's papers, including the chronometer, make a calculation of the course this vessel had taken from Pierre-Miquelon to the entrance of the Delaware Capes?

A. I did.

Q. According to the ship's papers so far marked for identification, the professed course of this vessel was from St. Pierre-Miquelon to Nassau in the British West Indies?

Mr. Green: I object.

[fol. 91] The Court: Sustained. The documents are not in evidence.

Mr. Green: They are not in evidence, and "professed course" I do not know where my learned friend gathers that.

The Court: Are you ready for these papers to be put in evidence?

Mr. Wales: I am, sir. I offer them now in evidence.

Mr. Green: We object to them, if it please the Court. To start with, they were not found on Callahan. Callahan's connection with these papers have not been shown, that he had anything to do with them. Further, until it is established that Callahan assisted or aided in the importation, we submit that they are not admissible. I think part of that your Honor has ruled upon with a reservation, but beyond that, the papers gathered from one other than the defendant, in which the defendant has not been connected with, I submit are not evidence against him, and I fail to see how he has been connected with the operation of this boat.

Now, it is true he went to an officer, according to the Government's testimony. The Government has established that he went to an officer and said, "If you let the boat go through, the boat is due to arrive tonight or tomorrow, I will pay you a certain sum of money," but that does not show that he in any way controlled the actions of that boat. Suppose by some information I knew that your Honor, upon leaving this court room, is going up Pennsylvania Avenue, and I say to a police officer, we will say, stationed at a traffic control station: "If you will let Judge Morris go through as he [fol. 92] goes by here, I will pay you a certain sum of money." That does not show in any way that I have anything at all to do with it. You are going and coming, and until there is a definite active connection, a positive connection, not an inferential one, then these papers are not admissible.

Mr. Wales: I think my learned friend has left out several very important matters. It is not to let a boat go through that we are dealing with here. We have the conversation between Gilhooley and Callahan, which in some important particulars is corroborated by Hickman, that Callahan had just returned from Canada where he had gone, and that he had been at that place. He used the pronoun "we." "We stepped her off." But he distinctly named the "Charles Edward" to see what she could do, and with sail and motor, the best she could do was six or seven knots an hour. "We then outfitted her and sailed her from Lunenberg to St. Pierre-Miquelon, where we loaded her with liquor." Then he turns from the use of the "we" to the "I," and he distinctly mentions that "we loaded her with so many kegs

of malt and then had to take some twenty-five cases off her because she needed more freeboard." Then he said, "I saw her sail from Pierre-Miquelon the evening of October 27th. I doubled back here. I left Charley Newton on board to pilot her between the Capes." If that does not connect Callahan with this importation, I do not see what can be said to connect him, for nothing can be more clearer or more positive or direct than that testimony.

He has put himself squarely on record, according to the testimony of Gilhooley and Hickman, as being directly connected with the procurement of this boat, this identical boat, the sailing of it from Pierre-Miquelon, and from there to [fol. 93] the Delaware Capes, and it was this very boat that he told Gilhooley if he would convoy her through the patrol, there would be five grand waiting for him at the drop. That is the testimony, sir, as I recall it.

Now, I think that that being the case, the "Charles Edward" being intercepted after having passed some four miles into the Capes and on the Delaware side, these papers were demanded of the captain of that boat by the officers in charge of the patrol, and were delivered on demand by the master to Osterberg, and that corroborates these papers themselves, the fact that the boat did sail on October 27th from Pierre-Miquelon with this cargo of intoxicating liquor, the kegs of malt and assorted liquor. Now, by this witness we propose to show that the papers indicating what her real course was, that from the first day out she deviated from that professed course until on the morning of the 10th of November she was some 300 miles to the west of her real course and heading directly into the Delaware Capes.

The Court: Thus anticipating a possible defense?

Mr. Wales: A possible defense.

The Court: Are you not anticipating a possible defense? What do you care what her course was?

Mr. Wales: It is not a vital part of the Government's case to show that she did deviate, but it is a vital part in corroboration of the other testimony to show that the boat actually cleared from Pierre-Miquelon on the day that Callahan said she did, the 27th of October.

[fol. 94] The Court: My sole question with reference to this matter is whether these papers or any of them are admissible against Callahan. These are not the vessel's log, are they?

Mr. Wales: The vessel had no log; no, sir.

The Court: It kept no log?

Mr. Wales: It kept no log.

The Court: Now, then, these papers are what? What are the papers which you now offer in evidence?

Mr. Wales: First is the list of the liquor. Next is the manifest; that is, the cargo consisted of a lot of diverse merchandise.

The Court: What would be the pertinence of that, Mr. Wales?

Mr. Wales: To show that her real cargo was concealed.

The Court: And the purpose of that?

Mr. Wales: A fraudulent importation.

The Court: I see.

Mr. Wales: Another paper is the clearance paper from Lunenberg to Pierre-Miquelon.

The Court: What have you to say to that, Mr. Green? Does the statute require fraudulent importation?

Mr. Green: I was going to suggest that. There is no question here involved of fraudulent importation. That is no Prohibition act.

The Court: The charge here is that this was imported in violation of the Volstead Act; that is the sole question?

[fol. 95] Mr. Green: Yes, sir.

Mr. Wales: That is the particular fact in which the Tariff Act of 1922 is charged to have been violated. We do not charge him that he violated the National Prohibition Act directly.

The Court: I understand, but the violation of the Tariff Act consisted in his bringing in liquor in violation of the Prohibition Act.

Mr. Wales: That is correct, sir.

The Court: Consequently there is no question of fraudulent importation, is there?

Mr. Green: Just the act of importation.

The Court: The act of importation.

Mr. Wales: The language of the act, sir, is: "Any person fraudulently or knowingly importing or bringing into the United States."

The Court: That is the Tariff Act?

Mr. Wales: Yes, sir.

The Court: Fraudulently or knowingly bringing into the United States. Will you read the rest of it?

Mr. Wales: "Or assists in so doing, any merchandise contrary to law."

The Court: "Fraudulently or knowingly bringing into the United States." Now, where would the fraudulently come in, Mr. Wales? Your strong point here is that he brought it in and did it knowingly and against the Volstead Act?

Mr. Wales: He not only knowingly but fraudulently caused the cargo to come in. The real nature of the cargo [fol. 96] was purposely concealed by this false manifest.

The Court: Is that manifest false?

Mr. Wales: Yes, sir; it is.

The Court: In what particular?

Mr. Wales: "A lot of diverse merchandise."

The Court: Well, I do not see that that is false or fraudulent. It does not tell the whole truth, but so far as the shipping point is concerned, that was not fraudulent, was it, because there this liquor was merchandise.

Mr. Green: It must be under the Tariff Act, "whoever brings in merchandise"——

Mr. Wales: It has been so held by the courts that liquor is merchandise.

Mr. Green: Then this is not fraudulent.

The Court: I do not see that it is fraudulent.

Mr. Wales: Well, the further purpose of it is, of course the manifest not only discloses that, but it discloses the name of the schooner that had this cargo, and that it sailed from Pierre-Miquelon bounded for Nassau in the British West Indies.

Mr. Green: Suppose we admit that as on paper.

The Court: Yes.

Mr. Green: In which it would set forth that a boat "Charles Edward" sailed from a certain point at a certain time with a load of diverse merchandise. The evidence is that they found the boat with 175 kegs and 132 cases of intoxicating liquors.

[fol. 97] The Court: Yes.

Mr. Green: Now, suppose we admit those facts for the sake of this argument. How does that show that this is a fraudulent manifest?

The Court: I do not see any evidence of it being fraudulent, but as that is the document showing from what port this vessel sailed, it seems to me that it is pertinent as

connecting this particular voyage with other evidence in the case.

Mr. Green: Now, here is an additional thought in connection with it. It seems to me that this particular shipment or the boat has not been connected up other than by the testimony that Callahan was there; that is, Gilhooley testified that Callahan told him of that; that around October 26th or 27th a boat was outfitted and sailed, and it was due at the Capes here locally November 3d or the next morning. All right. And that it was loaded with 275 kegs of Scotch malt, and that is as far as that went. Now, a week later a boat comes in. It may be the same boat, or it may be a boat of the same name, but there is no identity that it is the same boat. Just like there may be two John Smiths, there may be two boats called "John Edwards." And aboard that was not the same cargo, but an entirely different cargo, 275 kegs, plus 132 cases of liquor.

The Court: Additional cargo?

Mr. Green: Additional cargo. Now, where did that come from? Did that boat go back and reship, or what did it do? And the Government says without a full connection of it that it was the same shipment which Callahan referred [fol. 98] to. It seems to me that it is not admissible until they trace it all the way through.

The Court: I think this manifest is admissible, Mr. Wales, to show the voyage, not for the purpose of showing fraudulent importation, because here it is charged in the indictment "Knowingly and fraudulently import." It is admitted and you may have an exception, Mr. Green.

Mr. Green: Exception.

(Manifest received in evidence and marked "Government's Exhibit No. 1.")

Mr. Wales: And the list of the liquor was one of the other papers, and that shows the date it was loaded on the "Charles Edward," October 27th, "Received from the master of the boat," and Pierre-Miquelon is the place indicated on that list.

Mr. Green: I make the same objection.

The Court: May I see it, Mr. Wales, please? I want you to tell me what that is, Mr. Wales. I do not seem to be able to work it out.

Mr. Wales: It is a receipt given to the master of the vessel.

The Court: Given by the master of the vessel?

Mr. Wales: Given to the master of the vessel.

The Court: This is signed by Knickle, is it not?

Mr. Wales: It is signed by Knickle.

The Court: He was the master of the vessel?

Mr. Wales: Yes.

[fol. 99] The Court: It could not be a receipt given to him, could it? As I recall the testimony, the Coast Guard got it from the master of the vessel, but I do not know just what it is. I do not know whether Callahan is bound by that document or not.

Mr. Wales: The list here, sir, was delivered to the Coast Guard officer by the captain in response to his demand of what his cargo was. That is the evidence, and he handed this to him. Now, in the second count of this indictment, we are charging this defendant Callahan with aiding and abetting Albert Knickle and Charles Newton with this importation.

The Court: Mr. Green, what have you to say to that?

Mr. Green: This is what I do not understand: The witness, the commander of the seized boat, the young man here, testified that he got those papers from the captain. Now, whether they were the ship's papers, all or part, or exactly what they were, they were papers delivered to him. Now, I do not recall, and I have no clarity in my mind that he said these are the papers of this ship. Now, if they were the papers of the ship, that would be one situation, but if a Government officer asked a man to deliver papers over to him, and he gives him papers, including personal memoranda, etc., that does not tie up the man with the boat. Now, what this paper is, beyond a paper that had been given over to this man, we have absolutely no knowledge. Certainly it could not be a receipt given for this liquor by the master of the vessel, because that would be wherever the liquor was put aboard. Now, what it is, we do not know, unless it is some private memorandum [fol. 100] or something. It is not an invoice; in fact, I do not know what to term it, because I can not conceive what it is other than some memorandum of some kind.

The Court: Admitted under the second count, but not under the first.

Mr. Green: Exception.

(List received in evidence and marked "Government's Exhibit No. 2")

Mr. Wales: In regard to the clearance paper of this boat from Lunenberg to St. Pierre-Miquelon——

The Court: That is likewise admitted on the same basis.

Mr. Green: How would that show any importation if the boat went from Lunenberg over to St. Pierre? That has nothing to do with it. There is no testimony that any liquor was put aboard the boat at that time, and it does not give any assistance to us in this case that there was an illegal importation.

The Court: The only purpose it can have is for connecting this voyage with the voyage in question.

Mr. Green: May we have the same objection?

The Court: Yes.

(Clearance paper received in evidence and marked "Government's Exhibit No. 3.")

Mr. Wales: Another paper is the shipping articles which contain as one of the crew Charles R. Brown.

[fol. 101] The Court: Admitted on the same basis as the preceding papers.

Mr. Green: With the same objection, if it please the Court.

The Court: Yes.

(Shipping articles received in evidence and marked "Government's Exhibit No. 4.")

Mr. Wales: The other paper gave this vessel as foreign registry, namely, British registry.

The Court: What difference does that make?

Mr. Wales: The registry, of course, is not material except in so far as it corroborates the Government's testimony that this vessel was purchased at Lunenberg, Nova Scotia.

The Court: That would not necessarily make her a British vessel, would it, because she was purchased there? Could you not purchase an American vessel in any port in the world if you wanted to?

Mr. Wales: Only that it gives her capacity and gives her name as "Charles Edward" and also contains the certification "that Albert Knickle is in command of the within named vessel," and under that is the date, October 15, 1927.

The Court: Then it is admitted on the same basis.

Mr. Green: The same objection.

(Paper showing registry of vessel received in evidence and marked "Government Exhibit No. 5.")

[fol. 102] The Court: Is that admitted under the first count, as well, Mr. Wales, and if so, why? There is nothing about Knickle in the first count, is there?

Mr. Wales: We are not, as a matter of fact, anxious to put any more papers in the case than are necessary, and I believe that this last paper is not a very material part of the case, so I withdraw that, and I will also not offer the other paper, which is merely a certificate of the health of the crew.

The Court: Government's Exhibit No. 5 is therefore withdrawn?

Mr. Wales: Yes.

By Mr. Wales:

Q. According to the ship's papers now in evidence, the professed course of this vessel was from St. Pierre-Miquelon to Nassau in the British West Indies. I will ask you from your examination of those papers, the ship's chronometer, the charts and the mariner's note book, which were part of those papers which have since been lost, if you are able to calculate the divergence of that schooner from her professed course, and the amount of that divergence, from the time it sailed from St. Pierre-Miquelon on October 27th, 1927, until it reached the territorial waters of this district on the tenth of November following?

Mr. Green: We object on several grounds.

The Court: Divergence is enough. I sustain your objection. It seems to me the thing here is the knowing importation. If your case connects Callahan with the departure, and Delaware Bay is the destination, and it was brought into Delaware Bay, then we need not traverse the route,

[fol. 103] Mr. Wales: That is merely a matter of detail that I think the jury should know.

By Mr. Wales:

Q. Mr. Jordan, where is your home?

A. Well, I have no home in one sense of the word.

Q. Where was your home at or about the third of November, 1927?

A. I was stationed at Cape May, and I was living in the City of Cape May.

Q. How long had you resided there up to that time?

A. On that particular assignment I had been in Cape May for a period of about five months.

Q. Are you familiar with the location of Gilhooley's home?

A. I am; yes, sir.

Q. Mr. Gilhooley gave that location as Myrtle Avenue, and Mr. Hickman, I believe, gave it at Perry Avenue or Perry Street. Can you explain the apparent discrepancy between those two statements?

A. Yes, sir.

Q. Will you please do so?

A. Perry Street and Myrtle Avenue come in along there and are divided by a vacant green plot in the shape of a triangle, the greatest width probably about seventy-five feet, and the houses on both sides of the street face the triangle. On one side of the street it is known as Myrtle, that is, the north side. The south side is called Perry Street, the odd on one side and the even on the other. The street bears two names, although it is one street.

Q. To your knowledge was the location of Gilhooley's home in November, 1927, both on Perry Street and Myrtle Avenue?

[fol. 104] A. It could be called so. It is connected together there. It was really on Myrtle Avenue.

Mr. Wales: Cross-examine.

Cross-examination.

By Mr. Halle:

X Q. Do you know Callahan?

A. I know him.

X Q. Have you spoken to him?

A. I have spoken to him.

X Q. He knows you?

A. I believe so.

X Q. He knew you in 1927?

A. He ought to.

X Q. He knew you as Jordan in 1927, did he not?

The Court: What time in 1927?

X Q. Prior to November 7, 1927?

A. I am not qualified to say what he knew me as.

X Q. You spoke to him?

A. I have spoken to lots of people in the course of duties.

The Court: No. Answer the question.

X Q. I am talking about prior to 1927. You knew Callahan and he knew you; is not that so?

A. I believe so.

X Q. And you had talked to him a number of times prior to November, 1927, is that not so?

A. I doubt if I talked to him in the year 1927 at any time.

X Q. What is that?

A. I doubt if I talked to him in the year 1927 at any time.

X Q. When did you first know Callahan?

A. Prior to 1927.

[fol. 105] X Q. And he knew you as Jordan and you knew him as Callahan, is that not so?

A. I believe so.

(After five minutes recess.)

Mr. Halle: We have no further cross-examination.

(Witness excused.)

LUTHER STERNER

LUTHER STERNER, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. Mr. Sterner, what, if any, position did you hold under the United States Government on or about the tenth of November, 1927, and subsequent thereto?

A. Inspector of customs.

Q. Stationed where?

A. Philadelphia.

Q. Did you see the schooner "Charles Edward" on the eleventh day of November, 1927?

A. I did.

Q. Where were you then at that time, and where was the schooner?

A. The schooner was in Delaware Bay. I went aboard her about 9 o'clock that morning with Mr. Green.

Q. Were you present when the hatches of the boat were unsealed?

A. I was.

Q. Did you observe at that time the nature of the cargo carried by the schooner "Charles Edward"?

A. I did.

Q. What was the nature of that cargo?

[fol. 106] A. Kegs of Scotch malt and other assorted liquors.

Q. Was there anything else as far as you noticed but that sort of cargo on the schooner?

A. The ship's holds were filled with liquors.

Q. Were you present at the time the cargo was unloaded?

A. I was.

Q. Did you at that time draw any samples from that cargo?

A. I accompanied part of the cargo from the "Charles Edward" as it was being unladen to the appraiser's stores in Philadelphia, and the samples were drawn by Chemist McSorley in my presence.

Q. And what did those samples consist of?

A. Assorted liquors.

Q. Any malt?

A. I do not remember.

Q. Well, please examine these bottles that I am now handing to you, and state whether you have seen them before, and if so, when and how?

A. I have seen these bottles before. They were drawn by Chemist McSorley in my presence. These are the bottles brought up by me as part of the cargo of the "Charles Edward" to the appraiser's stores.

Q. And do you know who then took charge of them?

A. I did.

Q. I mean when you saw them withdrawn who took charge of the samples?

A. Chemist McSorley.

Q. Will you state whether or not this keg here was part of the cargo (indicating)?

A. That was part of the cargo, yes, sir.

Mr. Wales: Cross-examine.

Mr. Halle: No questions.

(Witness excused.)

[fol. 107] LEWIS B. MCSORLEY

LEWIS B. MCSORLEY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wales:

Q. Mr. McSorley, are you a Government chemist?

A. I am chief chemist at the United States Customs House, Philadelphia.

Q. And were such in November, 1927?

A. I was.

Q. Have you observed these samples here referred to by the preceding witness?

A. I have.

Q. From what source did you receive them?

A. I took them from the seizure made on the vessel "Charles Edward" on November 15, 1927.

Q. Was this included in the seizure, this keg (indicating)?

A. I know nothing about that keg; the bottles I am referring to.

Q. Included in the samples, will you state whether or not there is a sample of what is known as Scotch malt or Islay malt?

A. That is a sample of Scotch malt taken from keg No. 231, Islay or Scotch malt, a keg similar to the one standing before the jury.

Q. How was the keg from which this sample was taken labeled; what marking was on it?

A. It was stenciled in a manner similar to the keg which is standing there before the jury, numbered 6. On one end was stenciled "Pure Islay malt, made in Scotland; shipped by Sheriff & Company, Jamaica," and underneath that was "Glasgow." On the other end was stenciled "Great West Wine Company," "St. Pierre-Miquelon."

[fol. 108] Q. Did you analyze the contents of these various bottles?

A. I did.

Q. What did you ascertain from that examination as to the alcohol content?

A. I found they were all potable liquors containing more than one-half of one per cent. alcohol by volume.

Q. By potable, do you mean fit for use as beverage purposes?

A. I do.

Q. And from the time you obtained them, as you have testified, where have these samples remained?

A. They have been continuously in my possession. I am the only one that has had access to them. We have a locked vault where we keep them.

Mr. Wales: We offer those in evidence.

The Court: What is the alcohol content of them all?

The Witness: 60 per cent.

Q. This one bottle here I notice has been labeled "Poison." Will you explain what that indicates?

A. That is a fermented liquor, and after it has once been opened, the alcohol content would increase if we did not add something to it to prevent that increase; in case of a subsequent check on the analysis, we want the alcohol content to remain as it was when we opened it.

Q. What was this alcohol content?

A. 13.6 per cent. alcohol by——

Mr. Green: We object.

The Court: You contend that there is no connection with this importation as principal or as aider or abettor or assistant?

[fol. 109] Mr. Green: And we still reserve that objection.

The Court: Regardless of the contents of the vessel, Callahan can not be guilty unless he is found to have been a principal or aider or abettor in its importation, if importation there was.

Mr. Green: As to this malt extract in this bottle you have testified to, is that malt liquor or malt extract?

The Witness: That is a distilled spirit suitable for the preparation of beverage liquor.

Mr. Green: In other words, that is what you term a flavoring extract?

The Witness: No, no. That is really a liquor, a whiskey, as it is distilled in its original state of distillation. It has not been diluted with water sufficient to bring it down to potable strength.

(Six bottles received in evidence and marked "Government's Exhibits 5 to 10" inclusive.)

Mr. Green: In other words, Scotch liquor is made out of this extract then?

The Witness: That is it.

Mr. Green: And in order to make what is commercially known as Scotch liquor, what is done with this in order to make Scotch liquor?

The Witness: Water is added to it.

Mr. Green: Anything else?

The Witness: No.

Mr. Green: Can I drink that?

[fol. 110] The Witness: You can, but it would be hard on your stomach if you drank much of it.

Mr. Green: It is not a regular drink, in plain words?

The Witness: No, it is not.

Mr. Green: In plain words, is that a beverage?

The Witness: Some people might use it as a beverage. For the ordinary person it would be too strong. It would cause alcoholosis.

Mr. Green: No one could drink that then?

The Witness: I would not say that.

Mr. Green: What would you say?

The Witness: I would say that it was rather strong. It would take a person with a very strong stomach to drink much of it.

Mr. Green: I am perfectly willing to do this, if it is any assistance to the Government. If these other bottles, upon

the statement of my friend, came along with the other cargo, we are perfectly willing to admit that they do contain more than one-half of one per cent. and for use as beverage purposes.

The Court: You understand Mr. Green's offer?

Mr. Wales: I do not quite understand it, no, sir.

Mr. Green: If you will state that these bottles came from part of the same cargo we are willing to admit that they [fol. 111] are fit for beverage purposes and do contain more than one-half of one per cent.

Mr. Wales: The witnesses, Sterner and McSorley, have both testified they formed part of the cargo.

The Court: You are now speaking about the bottles that have been put in?

Mr. Green: Yes, your Honor.

The Court: He is not speaking of these, but the new ones.

Mr. Wales: These formed also part of the cargo that were taken from the boat while she was at the Marine Terminal and delivered to Mr. King and by Mr. King to Dr. Tiffany.

The Court: Then it is conceded Dr. Tiffany will state the alcohol content. You will not question it?

Mr. Green: I will not question it. We will waive his statement and admit that it did contain more than one-half of one per cent.

The Court: Then it is admitted that the additional bottles came from the cargo and contained more than one-half of one per cent. of alcohol by volume and fit for use for beverage purposes.

Mr. Wales: Did you want Dr. Tiffany to state the alcohol contents?

The Court: No, it is conceded.

(Three bottles were received in evidence and marked "Government's Exhibits Nos. 11, 12 and 13.")

[fol. 112] Mr. Wales: This was an original case, sir, of the High and Dry gin which was delivered by Mr. King to Dr. Tiffany.

The Court: Your agreement covers that as well.

Mr. Green: Let my learned friend do as he pleases with it.

Mr. Wales: We offer that in evidence with the others.

(Received in evidence and marked "Government's Exhibit No. 14.")

Mr. Green: Of course, my same objection applies to that.

The Court: Everything, I understand, comes under your objection, with an exception, so far as the cargo and its importation are concerned.

(Witness excused.)

JAMES P. GILHOOLEY

JAMES P. GILHOOLEY, was recalled as a witness, and, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Wales:

Q. You have already been sworn, Mr. Gilhooley. I hand you Government's Exhibit A, and will ask you to state whether or not you are familiar with the language in which that item appears as indicating cargo?

A. One lot of assorted merchandise.

Q. That is in French, is it not?

A. That is written in French.

[fol. 113] Q. And its translation is "One lot of assorted merchandise"?

A. "Placed on board October 27, 1927, by the Captain."

Q. That is in addition to the "placed on board by"?

A. "By the Captaino" is "by the Captain."

Cross-examination.

By Mr. Halle:

X Q. Will you please read the upper part, that is, translate the upper part word for word?

A. It is a manifest, "In the countries or in the districts of France, in the port of St. Pierre, this general declaration of the ship's supplies to the ship 'Charles Edward' from England, the Captain Albert Knickles." It does not give the tonnage of the vessel. "Leaving St. Pierre, the destination, Nassau. This manifest is furnished"——

X Q. What is after "Nassau"; we want that.

A. The last word is "water." "Nassau"—I cannot make out the next word. The next word is "water." I see "su mer."

X Q. That means Bahamas?

A. I take it to mean that, but I would not say so. "This manifest is furnished according to the terms of Article 5, Title 2 of the Law of the 22nd of August, 1791."

Mr. Halle: That is all we wanted.

Redirect examination.

By Mr. Wales:

R. D. Q. Mr. Gilhooley, I believe you have already testified when you boarded the "Charles Edward" you saw Charles R. Newton?

A. Yes, sir.

[fol. 114] R. D. Q. You had already known him?

A. Yes, sir.

R. D. Q. Do you know under what name he was going on board that vessel?

A. Charles R. Brown.

Mr. Green: Just a minute. There is better evidence. My learned friend has introduced it. He asked this witness, does he know what name this man went under. He saw fit to introduce the ship's paper. It shows the various employees, that is, the master and mates, etc., aboard that vessel, which is the best evidence. Now, how can this witness say that he knows under what name he was on that boat. Here are the ship's papers. This is the best evidence.

Mr. Wales: There is a Charles R. Brown in the crew. This man knows that that Charles R. Brown is the same as Charles Newton. That is what we want to bring out at this time.

The Court: Was Brown the alias or was Newton the alias?

The Witness: Brown was the alias.

Mr. Wales: His real name is Charles Newton.

The Court: Objection is overruled. That is in evidence and the question now is the identification there of the man under the name of Charles R. Brown, as I understand it.

Mr. Wales: Cross-examine.

Recross-examination.

By Mr. Halle:

R. X. Q. How do you know that?

A. He told me personally.

[fol. 115] R. X. Q. Was Callahan present?

A. At that time?

R. X. Q. No, sir.

Mr. Halle: I object, then, if it please the Court. It is not admissible.

The Court: Objection sustained.

Mr. Halle: Then I ask that it be stricken out.

Mr. Wales: The question here is whether under the count of aiding and abetting——

Mr. Halle: Here is a statement made to this man by some one else, and Callahan is asked to be bound.

The Court: If this witness knows, apart from the statement made to him, then he may testify, but if it is the relating of some conversation he had when Callahan was not present, of course Callahan is not bound by that.

Redirect examination.

By Mr. Wales:

R. D. Q. Do you know, Mr. Gilhooley, whether or not Charles R. Newton had an alias?

A. I did not know he had an alias, but I knew he was going to be aboard there.

R. D. Q. And he was a member of that crew, so far as you know?

A. When I said "Hello, Charley, hello, Newton"——

Mr. Green: Objected to on the same ground, because Callahan was not there.

The Court: Did you see Newton on that vessel?

The Witness: Yes, sir.

[fol. 116] The Court: Do you know who the other people were on board that vessel?

The Witness: I knew.

The Court: Did you see the papers giving the list of those on board?

The Witness: I do not think I did, sir. I saw the papers, but I did not look inside to see the name.

The Court: Sustained.

Mr. Wales: That is all.

Mr. Halle: No further questions.

(Witness excused.)

LUTHER STERNER

LUTHER STERNER, was recalled as a witness on behalf of the Government, and, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Wales:

Q. When you boarded the "Charles Edward" on the morning of November 11th, 1927, did you check up on who composed the crew?

A. I did, sir.

Q. How did you do it?

A. By calling the names on the articles, and the men answered to those names.

Q. When you came to the name of Charles R. Brown, who answered?

A. Charles Newton.

Mr. Green: I object.

The Court: What is your objection?

[fol. 117] Mr. Green: It is a statement by somebody not in the presence of this defendant, and it has no binding force upon this defendant.

The Court: Correct.

Mr. Green: And also about the other names——

The Court: What was the statement of Callahan to Gilhooley, who was to be on board, was it Newton or was it Brown?

Mr. Green: He said Charley Newton would be aboard; that is my recollection.

The Court: Then, I miss the pertinency of this either way. What difference is it, Mr. Wales, whether Newton was on board under the name of Smith, Jones or Brown?

Mr. Wales: Why, we have simply indicted him, sir under that name, that was all, Charles Newton, alias Charles R. Brown. That is the only purpose, because we have placed Newton on board there under the name of Charles R. Brown. That was all.

The Court: Well you have Newton on board and you have a Charles R. Brown on the list.

Mr. Newton: Merely to bring out the fact.

The Court: I do not see why that is essential.

Mr. Wales: The identity that is all, the identity between Charles Newton and Charles R. Brown, that is the sole purpose.

The Court: Objection is sustained.

(Witness excused.)

Mr. Wales: The Government rests.

Plaintiff rests.

[fol. 118] MOTIONS BY DEFENDANT AND ARGUMENTS FOR DISMISSAL

Mr. Green: I have several motions. First, we ask that the jury be instructed to return a verdict of not guilty on the theory that the Government failed to show that there was a fraudulent and knowing importation in violation of the Tariff Act by violating the National Prohibition Act, due to the failure or absence of the Government to show that there was a fraudulent importation.

The second motion is on the same ground, that the Government has failed to show that there has been any importation. Importation is a technical word and I think your Honor has more or less indicated it in your Honor's opinion, based upon the Keck case in the demurrer. That is a legal question, and I have my authorities present. The second ground is that there has not been any importation. In other words, if I may just, to make that clear, the law is very clear that to establish an importation you must pass a port of entry and make a failure to make a report at that port of entry, and the Government has not shown that at the time that they seized this vessel that it had ever passed any port of entry.

The Court: You are talking of customs duties, are you not? Suppose I go to Toronto and go across the border to Canada. Can I not import something without touching Customs?

Mr. Green: No, sir. Here is the situation we have at the present time, if I may use the expression. We have a hybrid indictment. This man is charged with what? Not violating the National Prohibition Act by importing, but is charged with violating the Tariff Act of 1922, by what? By importing or bringing in? Now, both of those words are used and we will present cases to you that, due to the [fol. 119] fact that both words are used, "bringing in" and "importation," that they are two different things. They are made to cover two different kinds of actions. Importing is one kind of an act, and bringing in is another kind of an act, and importation means that of passing a port of entry. So your Honor's directing or making an inquiry of me about a bringing in but not an importation——

The Court: I am lost. Will you not help me out?

Mr. Green: I think we are in a situation where we have had some rather clear thinking and very sound reasoning, if it please the Court, because of the fact of trying to make one act——

The Court: Let me get started right, won't you?

Mr. Green: Mr. Halle is more acquainted with the importation cases than I am.

The Court: Let us get started. Section 1 of the Eighteenth Amendment states: "After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

Does that mean that it is prohibitive for me to walk through a custom house with a bottle of liquor but that I am absolutely free to walk between custom houses with it?

Mr. Green: If it please the Court, if this man was charged directly with importing in violation of the National Prohibition Act, that would be one situation, but he is not charged with that. He is charged with knowingly and fraudulently importing and bringing into the United States merchandise contrary to law, and the law that this

[fol. 120] importation is contrary to, the law that this importation is in violation of, is the National Prohibition Act. Now, therefore, inasmuch as he is charged with an importation or bringing in, in violation of the tariff act, by doing an act that is in violation of the Prohibition Act, the word "Importation" then must have the meaning of importation according to the meaning of the Tariff Act of 1922, because that is the offense. The offense is, he imported in violation of that act by importing in violation of the National Prohibition Act.

The Court: I follow you there.

Mr. Green: Now, that importation has a strict technical meaning and a meaning we can not get away from, and upheld by the United States Supreme Court all the way through.

The Court: What is that?

Mr. Green: That is that in the arrival at the port of entry, intending there to discharge the cargo, as cited in Amos v. United States, in 13 U. S., import or importation means not only that there shall be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry.

The Court: You are getting into a field where I am not well informed. Was this vessel in the limits of any port of entry, and if so, what port of entry?

Mr. Green: Yes. That is the duty of the Government to establish. The only fact we have is that they went out to this boat before it had come in, I think about three miles off the shore, before it had an opportunity to reach a port of entry, and then seized it. Now, what happened after that? They took it over. The master of that boat lost command of it and it had no opportunity to go on to a port [fol. 121] of entry and declare itself and have these goods inspected. They seized it and immediately brought it under Government control to a port of entry in the City of Wilmington.

The Court: Gentlemen, if all of you want to hear this you may remain. If you do not want to hear it, you are excused until tomorrow morning at 10:30 o'clock. You either all go together or stay here together.

(At 4:25 o'clock P. M. the jury left the court room.)

Mr. Green: May I state my other objections, or I will take them up in any way your Honor indicates that I should?

The Court: Any way; go ahead.

Mr. Green: My third reason is that the Government has failed to show that Callahan made any importation, in the sense of what importation means.

My fourth motion is that the Government has failed to show any act within the District of Delaware of importing or assisting in any importation, and within the jurisdiction of this Court.

The Court: Let us assume for a moment that Callahan imported by bringing in this whole vessel load of liquor from another port. Then the vessel is found in Delaware. Then he comes within the definition of importation. Then there is nothing in that objection.

Mr. Green: Then the last objection is that it is the duty of the Government to show that the vessel sailed from a foreign port for the purpose of coming into a port in the United States. I have authorities for that.

The Court: I miss that.

[fol. 122] Mr. Green: This is the situation, if I may shorten it. The Government has seen fit to put in a ship's paper—I do not know the term of it—showing that this vessel sailed from St. Pierre for the Nassau Islands, and our contention in that respect is this: Here is the declaration that that is the course of that boat. Now, if for some reason after that the master of this boat changes that course and comes into the Delaware capes, how has Callahan assisted in that importation by leaving that particular port?

The Court: I get that. Unless the evidence shows that Callahan was a party to this coming into the capes for importation. That is, if it was blown in by a storm and her true destination was Nassau, that is one thing. Please give me that again.

Mr. Green: The first count is that the Government has failed to show that there was a fraudulent and knowing importation by bringing in.

The Court: It is necessary for the Government to establish knowing and fraudulent?

Mr. Green: Fraudulently or knowingly is the statute, but I think the information charges "and."

The Court: There is no question about that. It is necessary for the Government to establish that the defendant

brought in, or aided in bringing in knowingly, and/or fraudulently, intoxicating liquors.

Mr. Green: The law says so and the indictment charges it.

The Court: And there is no escape from that.

Mr. Green: No.

The Court: So your next question is whether it was done or not?

[fol. 123] Mr. Green: It is a question of argument of the Government's evidence.

The Court: What do you allege under that?

Mr. Green: I allege this: They have introduced the ship's paper. May I term it that? I am not sure whether that is the exact word. They have introduced the ship's paper to show the sailing of a boat from St. Pierre to Nassau, and I think the witness testified that that meant the Bahama Islands, and that it was declared to be a boat load of diverse or mixed merchandise; I do not know the exact words; it is in the French; I think a "mixture of various merchandise."

Now, how is that fraudulent, and what is the fraud about it? As I read that, as I understand the law, especially the tariff law, that is merchandise; intoxicating liquor is merchandise. In fact, if it were not merchandise the Government could not proceed under it, because the statute itself is "bring into the United States any merchandise contrary to law"; and our courts have held intoxicating liquors to be merchandise.

Now, what is fraudulent, then, about this to show that what this boat did have was not merchandise? In other words, there is an honest declaration. Now, how can it be fraudulent? Does your Honor grasp my thought on that?

The Court: Oh, yes.

Mr. Green: The second goes to the question of importation. Was there an importation?

The Court: Regardless of whether it was "knowingly or fraudulently"?

Mr. Green: Regardless of whether it was "knowingly or fraudulently," and regardless of whether Callahan did it directly or indirectly. In other words, was there an act of importation? And we submit that there was not.

[fol. 124] May I pass a memorandum to the Court?

The Court: Yes, indeed.

Mr. Green. I have not endeavored to brief all the cases, but the leading cases. You will note in Number 2, "to import or importation means a bringing into without making entry," etcetera, or "the introduction of goods," and that is decided in the Keck case. Your Honor may recall that upon the demurrer on this question, your Honor said this:

"The only allegation tending to show that custom- duties were due and payable is that the liquor was brought into the territorial waters of the District of Delaware. this is not sufficient"—and there is cited the case of Keck. Therefore, if the mere bringing into the territorial waters does not make customs duties payable, how is there any importation? Because customs duties are payable when there has been an importation. So there cannot be an importation, as your Honor, I think, has decided; but the same authority has — in detail that there has not been any importation.

Now, do not lose sight of this fact, if I may state an opinion to the Court, that the statute makes two things illegal—importation and bringing in. Importation means one thing and bringing in is another thing. May I make this clear, so that we keep this in mind? Let us recall again our indictment. Our indictment is that he did the act of importation and bringing in in violation of the National Prohibition Act, that is, by importing. He violated the tariff act by importing in violation of the National Prohibition Act. In other words, it comes solely down to a question but of illegal importation. And the tariff act, making the distinction as to importation, we are then bound by what is an importation according to the tariff act, with which we are charged with violating.

[fol. 125] The Court: Correct.

Mr. Green: Now, under the custom- laws, as pointed out in my paragraph Number 2, importation has a very definite meaning. Not only the Keck case but the next case decided that import or importation means arrival at the port of entry. Now, there is no evidence here by the Government that we have arrived at a port of entry. I have had an additional case in 9 Howard. It will next be noted that to import means arrival at a port of entry, intending there to discharge the cargo. That is in re May, 16 Federal Cases.

Now, the 13 U. S. case has the fullest definition we have: "Import means not only that there shall be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry."

In a more recent case import means actual arrival at a port of entry. That was the American Sugar case.

Now, in a very recent case, which was the question of an importation by boats going out to rum row, smaller vessels getting liquor from a boat at rum row, that is, beyond the territorial limits of the United States, this latter case reviewed and quite a few others stated that the Tariff Act does not apply until the goods have passed a customs barrier.

The Court: Suppose, to test the reasonableness of this, Cape Henlopen is not within the limits of some port of entry. I assume that it is. Not for the purpose of decision but just for the purpose of this testimony I assume that Cape Henlopen is not within the limits of some port of entry. Then I would be at liberty to land all the foreign goods under your theory there that I saw fit, without violating the Tariff Act, and if not, why not?

[fol. 126] Mr. Green: I do not say that. Here, before the boat can come into any port of entry, it is navigating; it has not come up to any place where it should report according to any evidence testified by the Government. If it tried to go by a Custom House or a port of entry without hauling to and reporting, then that would be an importation, but there is a boat coming in out of the Capes with Government vessels there awaiting its coming, and then there is a seizure before it has the opportunity of reporting. In other words, how can they assume that it will not go on and report at a port of entry? Because it is intercepted before they can do that very thing.

Just suppose I was to take our local law as to reporting a motor vehicle accident. For illustration, after I had a motor vehicle collision I am walking on my way to the police station where I am supposed to report, or if it is out of the city, to the nearest State Highway Police Station, which is the reading of the law, and I am intercepted by a police officer and he arrests me and then accuses me of not reporting it. Have I committed any offense? Why, absolutely not, because I was on my way there to do that

thing, and it was not until I had passed that port of entry or that reporting station and by my action I failed to do it that I failed to make my report.

The Court: I do not get it, Mr. Green. I realize that ordinarily there might be something in that contention. For instance, a vessel may come to New York Harbor and head up the Hudson River to its pier. Now, then, if it was on its way in the usual manner, in the usual course, and nothing had been done by it which would indicate that there had been any intention of doing otherwise than unloading and declaring the goods that it was bringing in, that would be one thing. But now, then, suppose the facts indicate that it is going to discharge this cargo while at [fol. 127] the Statute of Liberty?

Mr. Green: What is there in this case that gives any inference at all?

The Court: Callahan's statement to Gilhooley.

Mr. Green: Of course, that goes back to the next question, whether he is connected with that at all. But until it does that, suppose that the captain had a change of heart and was going to do something else. This is a criminal case and the Government must show that an offense has been committed, not by inference but as a positive fact. Is it not just as reasonable to think that the captain might come up and report it as that he would not? As a matter of fact, my reasoning is that there is more likelihood to think that he would, because we are bound to believe the presumption that he is a law-abiding citizen and will do that which is expected of him, as against that which is unlawful for him to do. We have to assume the lawful against the unlawful action.

The Court: But how does that explain the clearance papers for the Bahamas instead of Wilmington or Philadelphia?

Mr. Green: The failure of the Government opens this accusation to another criticism, because, according to the Government's testimony, as I have already emphasized, the boat that was expected was expected the next day, and a boat that was loaded only with kegs of malt, and not a boat expected to arrive a week later laden with other goods, and the Government has not shown, I think satisfactorily, that this was the boat that Callahan was referring to.

The Court: I think that is enough on that.

[fol. 128] Mr. Green: Now, take up Callahan's assisting or active importation, and this we most desire to stress: We contend that the Government has absolutely failed to show that Callahan had anything to do with an importation. Now, did he, according to the Government's evidence? The Government has shown that Callahan approached an officer and made certain statements to him, offering him a certain sum of money, which, at the utmost, would be an attempt at bribery, or may be bribery, or certainly an attempt at bribery. All right. But did that show that he imported in any way or that he assisted in doing any bringing in? At the utmost was it nothing more than saying to an officer, "If you keep your eyes shut, if you do not see or do a certain thing, this money will be for you?"

How did he assist it? He would have assisted it, certainly, if the officer had gone out and convoyed that boat in, but the officer says he did not, and I think there is no doubt about that, because all the officers said that there was no convoy and the man himself said he did not go out. Now, therefore, how did Callahan import or how did he assist in the importation? He approached a man in New Jersey and said certain things to him, and outside of that what has been any connection at all that he had anything to do with a boat coming into the Delaware Capes? Now, until the Government shows that, this man is not guilty of any importation at all, in the sense of what importation means.

The Court: Let me see: You may be right. I am going to let you stand on that. That may be right, but at the moment I think you are wrong. Let us check up on it. I find in the book which you passed me this case: "The offense of smuggling"——

Mr. Green: That is under a prior section, 475, which makes smuggling illegal.

[fol. 129] The Court: "The offense of smuggling is complete as to prohibited articles, when, though not unloaded, they have been brought into the territorial waters of the United States." That is 281 Federal, 243.

Mr. Green: If the Court please, that is different. That is under the words "bringing in," but we are dealing with

importation. I will say this frankly to the Court—maybe this will clear it up—if this man was charged with bringing in it would not be necessary——

The Court: The Tariff Act does not apply until the goods have passed the customs barrier. Now, then, our ordinary judgment tells us that that can not be true, does it not?

Mr. Green: No, for this reason: Suppose this boat turned back at that point and went back to sea again? What duty should it pay? It had brought nothing into the United States. It had a right to turn around and go back.

The Court: We are not dealing with duty.

Mr. Green: Oh, yes, we are dealing with an importation, which implies the paying of customs.

The Court: I am going to rule against you on that. I may be wrong but I am going to rule against you on that importation.

Mr. Green: Now, what did Callahan have to do with this importation? Perhaps I am only wasting time to repeat it again.

The Court: No, you are not. I have not considered it. [fol. 130] Mr. Green: Take this: The only evidence against him that he had anything to do with the importation is, as I term it, an alleged attempt at bribery, whereby he said to this officer——

The Court: No. No. The thing that he did, insofar as Gilhooley was concerned, if he had said to him: "You get five grand at the drop if you will see to it that the 'Charles Edward' gets to the drop without interference," your contention might be reasonably sound, but it seems to me that Gilhooley's testimony is for the jury, and Gilhooley's testimony shows the attempt or confession as well as attempt to do something else.

Callahan could now say: "I am guilty" and so enter a plea of guilty, but when he says to someone else that "we did so and so" and "I did so and so," and so and so was the purchase price of the vessel, and sending her in to the Capes with a pilot on board to bring her into the Capes, and then makes a statement which indicates that his intention is what he said it was, it seems to me there you have either one or the other thing.

Mr. Green: Perhaps we differ in our facts. He said that he saw it loaded, he saw the boat go off, but I know

of nothing whereby the officer—I just forget his name—said that Callahan had anything to do with the bringing of that boat into the Capes. All that I know, as I review it, is that he did not want this officer to interfere with that boat coming into the Capes, but he was not on the boat.

The Court: Suppose I had control over you and asked you to turn around and assault Mr. Wales, and said if you do not do it I shall do a certain thing to you. If I had brought about that assault through Callahan, it seems to me I would still be guilty as a principal.

[fol. 131] Mr. Green: I fail to see that, because he is charged with assisting. How did you assist? The act is, as you may notice, "Whoever imports or assists in importation." Now, how did you assist me in the assault of Mr. Wales?

The Court: But that law does not change the fundamental law about a crime, does it, that whoever does a criminal act through another is guilty as principal?

Mr. Green: I do not see that because of the word "assist" being in there. Did you assist me in assaulting Mr. Wales? Did Callahan assist in bringing this in? He endeavored to assist. Is this not where we are going astray? Perhaps Callahan endeavored to assist, but he did not do it because the officer absolutely did nothing in furtherance of it after the money was offered to him. Now, if the officer had gone out and convoyed this boat in or had done something——

The Court: Now I get your thought. I did not get it before.

Mr. Green: In other words, he merely goes up to an officer and says: "If you will keep your eyes shut I will give you so much money." Now, how did he assist, then, in the importation, because the officer did not go out and convoy that boat in? He merely talked to him and the officer said: "I will see what I can do," and then did everything just the opposite to prevent the importation.

The Court: You do not start soon enough, as I see it, in your importation. The law says this: "If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise" and so on "contrary to law." Well, now, need his assistance be first begun when the national boundary line is

[fol. 132] crossed, or does not a person who starts a vessel from some foreign shore into the Delaware water, assist? Does he not import?

Mr. Green: No, for this reason: Everything is legal until he reaches the three-mile limit.

The Court: I do not think it is.

Mr. Green: Well, here is a boat that clears for Nassau. Now, the only time it actually comes into the three-mile limit and into the jurisdiction of the United States—in other words, suppose that boat was sinking?

The Court: Suppose I shoot at you and for some reason the bullet does not reach you, I am not guilty of murder.

Mr. Green: I think that is a different proposition. Doing an unlawful act, the impulse goes with it. Suppose that boat sank, would the fact that, assuming that Callahan had assisted in starting the boat, as your Honor had suggested, and the boat sank beyond the three-mile limit, never having come into the territorial waters of the United States——

The Court: Then the act is not consummated.

Mr. Green: Could he be here charged with assisting because the boat had left? Not at all. His act then would not be consummated. Therefore, the act can only begin when that boat comes into the territorial waters of the United States.

The Court: I do not think so.

Mr. Green: Let me analyze it a little further. The boat had started when? Before he had a talk with Gilhooley. Gilhooley's testimony was the boat had left and was due in port that night. Was therefore the act——

[fol. 133] The Court: I do not follow you on that.

Mr. Green: Here is my thought on it: The boat had left. It was expected in the night. Now, what did he do after he talked to this man; what did he do in any way that assisted that boat?

The Court: I do not know as he did anything.

Mr. Green: Well, how could he be found guilty of assisting if he did not assist?

The Court: I do not get that. The only question that bothers me and comes to my mind, and I do not see how this p-inciple has anything to do with it: The principle I have in mind is one that was involved with the starting

of an act outside of the State of Delaware which resulted in the commission of a crime in the State of Delaware, and there was a question, then, of where the jurisdiction was because of that offense. If the other State involved was California, was that a violation of the law of California or Delaware?

Now, here we have St. Pierre-Miquelon, which is under the French Government. Everything that was done, was done there, but was consummated in Delaware, that is, in America. Let us go across the Great Lakes. For instance, I owned a boat and you were the captain and I asked you to transport from the Canadian side of the waters of Detroit into America a boatload of liquor. Would that be violating this law just as much if I stand on the Canadian shore as on the American shore, and how does the principle which was raised in the California and Delaware case concern us here, because the actual act of consummation was here, nothwithstanding it was put into motion and operation and started in, let us say, France?

Mr. Green: Are we not losing sight of this: Of course, in a conspiracy there would be a different situation. If any overt act was done there would be no doubt of juris- [fol. 134] diction there, but has it been shown that Callahan had anything to do with bringing the boat in? What he did, if anything at all, was to approach this man in New Jersey in his home, without this jurisdiction and arranging for the boat to sail from a French jurisdiction.

The Court: There may be something in it. I take that differently. I consider that now only what this man did as constituting his importation or assisting in the importation, and that all he did in New Jersey was to convey to Gilhooley what he had done in the French Islands.

Mr. Green: Well, then, I cannot get away from this fact, that he has done nothing, that he did no act that means an importation or assisting in the importation within the jurisdiction of the United States. He might have set something in motion in a French province which might or might not have been consummated. But until that comes within this port of entry and there is a failure to report, then he has done nothing within the United States.

The Court: Suppose the French Islands had been three miles off the line of the Delaware Capes and you had been out just beyond the three-mile limit and you had a boat

which could be so set in starting apparatus that it could be set by you in motion, and then it would land, let us say, within the Capes, and there was a person there ready to receive it. Would you not be importing just as much as if you had been within the Capes and had arranged to bring it in?

Mr. Green: You mean that I put the boat in motion and then it crossed the territorial waters into the United States and then it was seized here in these waters? I fail to see how I import it, in a sense, because what did I do to bring it into the United States?

[fol. 135] The Court: You did bring it in.

Mr. Green: Well, I do not understand the full force of your Honor's illustration. This is what I cannot get: Unless I actively participate in the actual introduction of merchandise unlawfully into the United States I do not import because, as I say, if that boat had sunk, if that boat had turned around, then the mere fact that I put it in operation has nothing at all to do with the case.

The Court: That is true.

Mr. Green: Well, then, if I have nothing to do with the actual introduction, how can I be guilty?

The Court: Where there is a continuity, where you had the intention and that is carried out and consummated, it seems to me that there is importation. I will reserve decision on that.

Mr. Green: I think my learned friend would like to say something on this.

The Court: I will hear him. I will ask Mr. Wales this: Mr. Wales, can you indict successfully every man, whatever his nationality and whether he has never left the nation of which he is a citizen or subject, for sending boats into America laden with liquor, there to be unloaded in violation of the Tariff Act?

Let me put it this way: Suppose a vessel starts from England, France, Spain or Italy laden with liquor for the same destination as was the "Charles Edward." The vessel is owned by an Englishman who has never been out of England, but he started the boat on its course. The same is true of the Spaniard and the Frenchman and the Italian. Are they violators of our Tariff Law to the same extent, being in those foreign countries, as they would have been

[fol. 136] had they produced the same result being in Delaware at the time it happened, or anywhere in America.

Mr. Wales: Well, I think my learned friend has tried to load this case down with a great many technicalities and specious arguments. Now, all this time he spent emphasizing propositions as to what importation consists of. That is beside the mark. Importation, in the language of the Supreme Court itself, in a case more recent than any that he has called attention to, namely, in the Cunard Steamship Company v. Mellon, 261 U. S. 100, is defined as "bringing and coming into a country from the outside. If there be an actual bringing in it is importation, regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the Act." Now, that, I take it, is good law.

The Court: I admit it. I start beyond that point.

Mr. Wales: The charge here is not only that Callahan imported or brought in knowingly this contraband liquor, but he also aided and assisted others in so bringing it in, and the evidence to sustain those charges, it seems to me, has been very clear by his own admission in a conversation with Gilhooley, which is substantially corroborated by Hickman. This man said that he had just returned from Canada, that he had gone up there and purchased this "Charles Edward" and had stepped it off to see what it would do, and he said it would only make some six or seven knots an hour at her very best.

The Court: I get that. I go beyond that. I am with you on all that. Nevertheless, there arises a question of law. Suppose Callahan had never come into the United States of America after he had sent the "Charles Edward" down to the Delaware Capes and into the Delaware Bay [fol. 137] for unlawful importation and unloading, would he be a violator of the laws of the United States?

Mr. Wales: There has to be an actual bringing in, sir, to make it fall within the four corners of that statute.

The Court: Now, you miss the question, or I did not state it clearly. Suppose everything had been done here that was done, with the exception of the conversation with Gilhooley. Now, let us admit that you can prove otherwise than by Gilhooley what Callahan did with respect to this vessel and her departure from the French Islands. Would Callahan be amenable to Section 593-B of the Tariff Act,

the vessel having come into Delaware Bay and been assisted as she was? But suppose Callahan had remained at the French Islands, could you extradite him?

Mr. Wales: Why, you cannot extradite anybody in a foreign country, but I think that is beside the mark, sir. Why is that raised here as a theoretical case when it is not the case?

The Court: Then, what is the importation or assisting in the importation that Callahan did in the United States?

Mr. Wales: Why, from the fact that he admitted at the start that he obtained the boat, that he had loaded it.

The Court: I am confused, Mr. Wales.

Mr. Wales: And then the offer of bribing the Coast Guard. Now, if he was not interested in bringing that boat in with its unlawful cargo, does that indicate that he was——

The Court: Now, you are going back to the evidence. What I wanted to know—and I am not going to be able to [fol. 138] grasp it until I get it—is, suppose Callahan had stayed right on these French Islands and had done everything there which Gilhooley says Callahan said to him that he, Callahan, had done up there, and then the vessel had come on in as she did. Would Callahan then have been, without his visit to New Jersey and Gilhooley, amenable to Section 593-B of the Tariff Act as a violator of that act, and would you have been able to get him if there are treaties of extradition between France and America?

Mr. Wales: We could have indicted him as we have indicted Knickle. We have never gotten Knickle yet.

The Court: Knickle came into Delaware Bay. He was the master of the vessel.

Mr. Wales: That is true, but why do we base that theoretical——

The Court: I will tell you why. Because at the moment I do not see that Callahan did, after he came to America, with a vessel on the high seas, anything which actually imported or assisted in bringing her in. He rendered her no assistance. As a matter of fact, he got her arrested. But there is nothing that he did within the territorial jurisdiction of the United States that either actually imported or assisted in the importation. Now, if he imported, as I see it, or assisted in the importation, both those acts were done in the French Islands, but the consummation of the act

thereupon started into being by him was consummated when the vessel came inside the Delaware Breakwater.

Mr. Wales: Did he not aid and abet Charles R. Brown and/or Albert Knickle?

The Court: Where?

[fol. 139] Mr. Wales: In helping to load the boat at Pierre-Miquelon.

The Court: I agree with you. But then I ask, is he amenable to America's laws for anything that he does in France?

Mr. Wales: Well, if your Honor took that view——

The Court: I will not take it. I simply do not know.

Mr. Wales: Well, following out that as a logical conclusion, if that were so, how could anybody be prosecuted for unlawfully bringing merchandise into this country until it had actually passed through the customs?

The Court: It does not have to pass through the customs. That is not my difficulty.

Mr. Wales: The fact that it was begun outside of the territorial jurisdiction of this country to be consummated here, it seems to me makes the crime complete.

The Court: There was an unlawful importation. Let us concede it so far as Knickle was concerned. Knickle is not here; we are not interested in him; but let us consider as far as Knickle was concerned, there was an unlawful importation and violation of Section 593-B. Now then, let us concede for the purpose of this testimony that the man who started this whole movement, who bought the vessel, who loaded the vessel, who fixed her destination and started her on her course was Callahan; that Callahan then was in France or in a French possession. The question I want to know, is such a man subject to the laws of the United States, and if so, is not every Englishman and everybody [fol. 140] else who has started his vessel to bring liquor into the United States subject to indictment and extradition under treaties of extradition with these other countries?

Mr. Wales: Well, I would think so if any Englishman came over here from his own country.

The Court: The man I am talking about never gets out of England. He does not leave England. There is my difficulty.

Is it your thought, Mr. Wales, that Callahan went on his trip to Gilhooley and actually did anything then which

could be construed as knowingly importing or assisting in so doing?

Mr. Wales: The act that he was guilty of, of course, was the attempt to bribe, which did not succeed. Outside of that act there was clearly a knowledge on his part of this vessel's coming in with her unlawful cargo. There is unquestionable evidence that he had placed Charley Newton on board of that boat for the purpose of piloting her in to the Delaware capes.

The Court: All of those acts were done by Callahan in France.

Mr. Wales: That is true, they were done in France. The boat was obtained in Nova Scotia and equipped and a crew shipped at Pierre-Miquelon, where the cargo was placed on board, in all of which he participated, and then it proceeded to sail to the Delaware capes, preparation for which he had to make previously; and that was done, that preparation or that plan, we submit, was conceived here, not up there. He had not in mind when he left here what boat he was going to buy. He went up there to buy a boat.

[fol. 141] The Court: Well, so far as I know, he never did any act in America with respect to this importation.

Mr. Wales: Why, he could not have imported until he went outside America.

The Court: The same old problem comes back to me and I have to meet it.

Mr. Wales: Well, I can not conceive of any difficulty, at least not on the aiding and abetting and assisting count in this indictment, for certainly the plan was consummated by getting that boat into the Delaware waters.

The Court: How?

Mr. Wales: How? By his assisting in procuring the boat.

The Court: Now, you are going back to France again.

Mr. Wales: Supposing it is back there.

The Court: Can you successfully prosecute a man here or any other place in America for any act that he does in France?

Mr. Wales: Well, while the act was started there, it was not consummated there.

The Court: Will you not help me with that in the morning? I will have your memorandum at 9:30 in the morning.

Mr. Wales: I will try to have one.

(Whereupon, at 5:25 P. M., adjournment was taken until tomorrow, Tuesday, January 14, 1930, at 10:30 o'clock A. M.)

[fol. 142] IN THE U. S. DISTRICT COURT, WILMINGTON, DELAWARE

Tuesday, January 14, 1930—
at 10:30 o'clock A. M.

Second Day

Before Hon. Hugh M. Morris, U. S. District Judge

Appearances: As before.

The Court: Are you prepared with your authorities on each side?

Mr. Wales: Yes, sir.

The Court: Then let me bring the jury up to date with what we were discussing, because it must be very uninteresting to sit and listen to an argument from time to time and not know what the real point of the discussion is. So I think I can tell you in just a moment.

So far as this defendant Callahan is concerned, we may consider that the person was never in the State of Delaware, that is, in the district or within the jurisdiction of this Court, until after the "Charles Edward" came into Delaware Bay, if the "Charles Edward" ever did come in. I say that because all facts are for your determination. Now then, the question arises as to how this Court then gets jurisdiction to try Callahan. If he was not here and if he personally did nothing in the State of Delaware, in the District of Delaware, then what business, what power, what authority, what jurisdiction has this Court to try him for something that he may have done elsewhere, in the jurisdiction of France? Because these islands were French Islands off the Gulf of St. Lawrence where this vessel started from, if the testimony given is to be believed [fol. 143] by you, and this was the same sailing which was

referred to in the conversation, if conservation there was, by Callahan with Gilhooley, so that the question that we were discussing when Court adjourned last night, was whether this Court had jurisdiction over this defendant under the circumstances, that whatever he did with respect to this vessel, if anything, was done when he was within the jurisdiction of France, namely, on the French Islands in the Gulf of St. Lawrence. That is the question that was under discussion last night, and I asked counsel on each side to present authorities to me at this time. The question is whether this Court has jurisdiction. That is a problem of mine. If I find that it has, then there will be some problems for you. If I find that it has not, then there will not be any problems for you.

Mr. Green, have you any authority which indicates that the Court has no jurisdiction?

Mr. Green: If it please the Court, I have some thoughts. I can not say I have so much authority. I think, however, we should keep in mind our two constitutional provisions. I think it is hardly necessary for me to refer to them in detail, but merely to emphasize them, under Article 3, Section 2, it is provided that: "All trials shall be held in the state where said crime shall have been committed." And the sixth amendment, affording to every defendant a speedy trial, etc., and it goes on: "By an impartial jury of the state and district wherein the crime shall have been committed." I think that is so fundamental that I hardly need emphasize that.

The Court: There is no question at all as to that being the basic proposition.

Mr. Green: And of course coming back to that, you will find that the judicial code has endeavored to draw up cer- [fol. 144] tain provisions in connection with or in compliance with these constitutional provisions in relation to jurisdiction, and read the judicial code as you will, you can not find anything in there that will cover a situation where there is an offense in the conception that is legal where it began, and then an act maker in the particular district, which then becomes illegal, in which the defendant was present, where it was legal. And then the question arising whether he was constructively present, if I may put it that way, when the act became illegal.

I think the difficulty of finding any authorities is this: Of course, there are plenty of authorities where an illegal act is done in one given state or in a given district, and that illegal act continued on into the state of consummation. Just like, we are all familiar certainly with the principle of a man standing on a border of a state or an international line and shooting a gun, that being illegal in both jurisdictions can not help us in this present situation, because I desire to emphasize here the loading of the boat, or the alleged loading and outfitting of the boat or alleged loading of the boat not being an unlawful act in St. Pierre, either by the French laws or by the laws of this country, in fact, this statute does not make it illegal to load a boat with liquor in a foreign country. The importation is what is made illegal; that is, bringing it into the territorial waters of the United States is made the illegal act. Therefore, we are confronted with this situation: A legal act done in inception which, when certain additional things are done, that is, the introduction of it into the territorial waters, it becomes illegal. So all those cases seem to me can not be of any benefit to us.

Now, in the Keck case which your Honor referred to in the demurrer just before the first part, your Honor uses this language—and I ask the Court to note this; I do not have the brief; I did not have time to brief it this morn-[fol. 145] ing: "That mere acts of concealment"—this was a concealment under the smuggling section, which is a section before this particular section: "It follows that mere acts of concealment of merchandise on entering the waters of the United States, however, preparatory they may be, and however cognantly they may indicate an intention of thereafter smuggling or clandestinely introducing at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction"——

The Court: And "not alone" what?

Mr. Green: "However preparatory they may be, and however cognantly they may indicate an intention of thereafter smuggling or clandestinely introducing at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction;" in other words, if I may paraphrase that language and apply it to a particular case, the Supreme Court has said, "that every step

preparatory to the actual introduction is but merely an attempt and is not a violation of the law."

Now, to take that and apply it to the instant case. Take the alleged statement of Callahan of the outfitting and the loading of the boat. At the best such can be only considered as preparatory steps or attempts to introduce liquor into this country in violation of the Customs Act, and is not importation. It seems to me that that is the nearest approach that we have, and of course this is also under the customs law with which we are dealing.

Now, to take another situation: Can it possibly mean, as your Honor indicated last night, that the outfitting of a boat in France or the British West Indies or Scotland or England, etc., would make every individual there guilty of that offense? If so, the question of Rum Row has been well [fol. 146] settled. In other words, I think we are bound to take notice of the existing facts, and we certainly can do it for the purpose of an argument, that outside of the twelve-mile limit there have been boats constituting a problem as far as the United States has gone. Now, can it mean—and we have cases as to boats going out to Rum Row and there acquiring liquor, where those boats, being off the coast of the United States are bound to know that it can only be for the purpose of being brought into the United States, because they have travelled practically three thousand miles from the westerly Atlantic coast to within twelve miles of the easterly coast, and it can only be that boats coming out there would be coming to the easterly or Atlantic coast line. I think that is a fair presumption, and I think that is a fair presumption in the Parillo case, where the Court passes not only upon the labels, but as to the statement of a man that he bought it from a man who bought it at Rum Row. The Court holds that that is not sufficient.

Now, that is not sufficient evidence of an importation. As I started out in my thought, if that is the situation, that the outfitting and loading of a boat in a foreign country constitutes an act of importation, it would mean then that the Government could have gone out without any treaties with any country at all and cleaned up Rum Row because they would have held that having liquor that was designed for introduction to the United States, then that was an act of importing, and the problem would have been solved. But

there was necessity thereafter to resort to conventions with Great Britain and other countries as to treaties.

Therefore, I cannot possibly conceive that there is any violation at all by that mere outfitting of those boats, and therefore the act is not an act within this jurisdiction, but an act within a foreign jurisdiction, which is legal there [fol. 147] and can not become illegal until there is an active participation by a particular defendant in a particular district in which he is being tried.

May I ask Mr. Halle to follow? I think he has some additional thoughts.

The Court: All right.

Mr. Halle: In the Romano case, 9 Federal, Second Series, the Court has ruled: "We find nothing in this record except the presence of the ship in Huntington Harbor on the morning of December 31st, and papers indicating a transportation of cargo to ports named herein which may or may not have been fictitious. The log book tells us her position and weather conditions on days during her voyage. It shows nothing more than this. These circumstances which are presented and from which we are asked to draw inferences, do not include the hypothesis of innocence which may be drawn. The facts are as consistent with innocence as with guilt of the accused, and under such proof there was nothing to be submitted to the jury, and it was the duty of the Court to direct a verdict upon motion which was fully presented."

Now, in another part of this Romano case, the Court also rules, in a prior paragraph, at page 524: "We cannot eliminate the possibility—indeed the probability—that the cargo, if ever landed by defendants, was at a place less frequented than the shores of the eastern district of New York, or that the defendants had parted with it outside of the United States, or even abandoned it at sea. This criminal phase of the Prohibition Laws is defective only in the territory of the United States." Citing cases. "It is not a crime to sell or deliver intoxicating liquors on the high seas." Citing the Over-the-Top case: "It is suggested that we may infer that there was an importation by smaller boats, which unloaded the cargo while at sea. But this [fol. 148] could not be an importation by the defendants below. The burden rested upon the Government to prove beyond a reasonable doubt that the cargo was imported

within the Eastern District of New York." Citing the case of the United States against Meagher.

In the Perillo case, the Court says—this is a Third Circuit decision, your Honor: "That the whiskey in question was imported is proven, if proven at all, only by the alleged confession of the defendant who was said to have declared that he got the whiskey in question at a point near the coast line of New Jersey from a man who had bought it from the boats. As stated in substance by appellant's counsel upon argument, the whiskey was labelled as Scotch whiskey, but he contended, and with justification, that the mere label was insufficient to determine that the contents of the whiskey cases had been imported. It would seem to require some little stretch of the imagination to say that the importation feature was established by the second-hand declaration of the defendant's predecessor in possession to the effect that the whiskey had come from the boats."

There is another case which was on the civil side of the Court. I did not get an opportunity to get the citation. It is United States against 2180—I think it is the Zeehund case, where they have them ranging along the coast for the purpose of bringing in liquor.

Carrying out Mr. Green's argument, I respectfully submit that if a man could be charged with doing something with a substantive offense in a district where he has done nothing, then there is nothing to prevent every one of the men on board the rum boats on the outside to be brought in merely because they sell liquor to smaller boats that come into the United States.

[fol. 149] The Ford case—probably anticipating my opening—the Ford case, which is a United States Supreme Court case, that is, out in California, in 3 Federal, Second Series, in that case the crew of the Quandra were indicted for conspiracy, but in that case the crew were parties to bringing the liquor into the United States, and of course being a conspiracy case it was not necessary to show the presence of the defendant in the district. In other words, it is either where the conspiracy was formed or where the overt act was performed. And of course there the whole thing becomes illegal from its inception, but here in this case, Callahan did absolutely nothing. He always had the opportunity to repent. Every one has an opportunity to repent. If two men

should go out to rob a bank and they are actually at the doors of the particular bank and one man repents and goes home, and the other man goes on and continues with the unlawful pursuit and does rob the bank, why, the man who repents could not be charged with the offense.

In this case here, applying the rule that where inferences are as consistent with innocence as with guilt, the defendant is entitled to every inference of innocence. The nearest that we have here in the evidence of Callahan with this enterprise is on November 3d. Now, at that time, nothing illegal had occurred as yet. The boat, the "Charles Edward" did not come until the tenth. A whole week's time elapsed. What Callahan did in seeing the coast guard was in the District of New Jersey. Now, what is there to show in this case that on the 10th of November, Callahan was a party to this enterprise of bringing this boat in, and if there is no evidence, we surely have no right to infer guilt. We must infer innocence. I have other motions to make, but I will not press them at this time.

Mr. Wales: If the Court please, after an examination of all the authorities I could find within the time, I have not [fol. 150] the slightest doubt that at least under the aiding and abetting count of this indictment, we made made a sufficient case against this defendant both in law and in fact. Now, we start with the statute. We find in 18 United States C. A., Section 550, that section makes an aider and abettor the same as a principal; and the authorities have well established the proposition that one who aids and abets the commission of an offense or counsels and advises or procures its commission, does not have to be personally present at the place where the crime is actually committed. The definition is found in 16 Corpus Juris, Section 118, page 130, under Aiding and Abetting: "All persons who are actually or constructively present at the time and place of a crime, whether it is a felony or merely a misdemeanor, and who either actually aid, abet, assist or advise its commission, or are there with that purpose in mind, to the knowledge of the party committing the crime, are guilty as principals in the second degree, although they did not themselves accomplish the purpose."

In the case of Latham against the United States in Second Federal Reporter, Second Series, page 208, decided by

the Circuit Court of Appeals in the Fourth Circuit, the facts were that——

The Court: What did it decide, Mr. Wales?

Mr. Wales: That was on the twenty-first of October, 1924. There was a rum boat involved in that case which left Nassau on July 5, 1923, with a cargo of 3500 cases of whiskey owned by three persons in Nassau. She did not make her pretended destination, but on the twentieth of July was sighted by the coast guard cutter about seventeen miles east of Cape Henry, Virginia. The cutter followed this vessel to the limit of the waters she was assigned to guard. The boat was next sighted by the cutter on July 30th near [fol. 151] Hog Island, Virginia, headed away from her pretended destination. The direct voyage from the Bahamas to the Virginia capes should have been made by the schooner in five to seven days. The officers kept watch on this whiskey-laden schooner and seized her, when, according to their testimony, she approached within two miles of the Virginia coast. The officers of the schooner claimed that if she sailed into the territorial waters of the United States, the entry was incidental and involuntary, when she was on her voyage to Nassau for water and food supplies. In the course of its opinion, the Court said: "The evidence and admissions of the defendants themselves tends strongly to prove their offense of possession, transportation and selling whiskey in the United States. The master that was sailing his vessel along the coast——"

The Court: Mr. Wales, was the case there against the people on board only or was it against people in Nassau who owned the vessel and put her afloat?

Mr. Wales: There was evidence of sales made by the people on that boat to people on shore, and the Court referred to this statute about the aiding and abetting, and said: "It is argued on behalf of the defendants that they should escape, because the aiding and abetting in the crime of those who sold in the United States whiskey purchased from the ship was on the high seas outside the territorial waters of the United States. The facts do not bring the case within the general rules that the character of an act as unlawful or lawful must be determined solely by the law of the country or place where the act is done. The defense, therefore, that the defendants sold the whiskey on the high seas, where it was lawful to sell it, is not available. The defendants

being under arrest in the United States, it makes no difference that they were outside the jurisdiction when, by aiding [fol. 152] and abetting, they became principals in crime committed in the United States."

The Court: Well, now you have not told me who was charged with the crime and with what crime they were charged.

Mr. Wales: They were tried on information charging, in three respective counts, possession, sale and transportation of over 28,000 bottles of whiskey on board the schooner "Pesaquid," off Portsmouth, Virginia, and within the territorial waters of the United States.

In Ford against the United States——

The Court: Just a minute. Before we leave that case. They were charged as principals or with aiding and abetting?

Mr. Wales: Well, I do not know that the report here states that. The error *sight*ed was in the refusal of the motion to instruct the jury to acquit made at the close of the evidence for the Government on the ground that nothing had been produced tending to prove the guilt of the defendants.

The Court: And they were charged with possession, sale and transportation?

Mr. Wales: That is what the report shows. The defendant Lathan was master, and the defendants Cowart and Schwarz were the supercargoes on this schooner, which flew the British flag, and was owned by the Bahama Fisheries Company of Nassau. Her destination was Pierre-Miquelon. In other words, the voyage was just exactly reversed in that case as the one we have here.

The Court: Will you not just state for me your proposition, Mr. Wales, and then tell me the cases that you have, [fol. 153] without turning to those cases? It may be that I have seen some of them.

Mr. Wales: The next case——

The Court: No. What is your primary proposition? What is your basic proposition?

Mr. Wales: My primary and my basic proposition is this: That this defendant Callahan set in motion the forces at Lunenberg and at Pierre-Miquelon which made possible the actual bringing in of this contraband cargo of liquor. It was not necessary for him as the master mind of this offense to be actually present at the place where the offense was con-

summated, namely, within the territorial waters of this district. He could have been an aider, abettor, counsellor and advisor of this offense without being at all anywhere near the point where the crime was committed, and his mere absence at that time does not make justice short armed. There are decisions in the Supreme Court of the United States which so hold.

The Court: Hold what?

Mr. Wales: That the man who aids and abets in the consummation of a crime, even though absent at the place where the crime is committed, is not thereby guiltless.

The Court: Oh, there is no doubt about that. An aider and abettor, an accessory before the fact, does not have to be present. The primary question here is whether he nevertheless is present where the crime is committed to an extent that gives jurisdiction to the Court of the district in which the crime was committed.

Mr. Wales: The general proposition is that when one puts in force an agency for the commission of a crime, in legal contemplation he accompanies the same to the point where it becomes effectual.

[fol. 154] There is an annotated case found in 42 American Law Reports which cites a great many cases where absence from the state at the time of the offense to what extent affects the jurisdiction of the offense. "A person in one jurisdiction may put in force an agency or force which does harm in another jurisdiction and he will be considered constructively present at the place where, by this command or authority, his act is executed."

In another case——

The Court: You need not go into facts. Have you anything in reply, Mr. Green?

Mr. Green: Yes, it seems to be this. I do not know of any of these later cases or what kind of cases they are, but certainly there is a world of difference between the conspiracy and the doing of a substantive act.

The Court: Let us lay conspiracy aside. You are correct.

Mr. Green: So many cases that we have reviewed deal with that proposition. Now, it might be in this particular case, in connection with that of a guilt or an inference arising out of conspiracy, because there the doing of the act of one after a conspiracy is performed becomes the act of the other party. There is no doubt about that proposition.

But the converse of that which has given rise to the law of conspiracy is not the same, and where the individual is absent and it is not a conspiracy, then there is no crime until it is shown that he does a substantive thing. Otherwise, we would not have the law of conspiracy. It would not be necessary to have a charge of conspiracy. That is the very purpose for which the crime of conspiracy has been created, because of the absence, because of the non-existence in a given jurisdiction of the individual, because it was not his act but his agent's act, and if that is true, then it means the [fol. 155] converse of it is so that the principal must be present to do that particular act because he is charged with doing the substantive thing.

Mr. Wales: I forgot, if the Court please, to refer to that Romano case that my learned friend referred to.

The Court: You need not deal with that. The motion for an instructed verdict will be denied. I have made some independent investigation and I have listened to counsel in order to be able to check for my own satisfaction the accuracy of my tentative conclusions which I arrived at as a result of my independent investigation.

The facts for the purpose of this motion, but not for your purposes, gentlemen of the jury, because you must find the facts in solving the problems that will be submitted to you; I found them purely for the purposes of this motion, but you are not bound in dealing with your questions by the finding of fact which I make in this matter. The facts so far as testified to, according to my recollection, are these: That Callahan went to Gilhooley in the state and district of New Jersey and there told him certain things, to wit, that he had purchased the vessel at Lunenberg, that he had loaded the vessel at the French Islands, whatever the names may be, and the vessel "Charles Edward" was coming into the Delaware capes laden with liquor, and that the drop was the point of discharge, intended discharge of cargo, was at or near Reedy Island.

Subsequently the vessel did come into the Delaware waters, into the territory of this jurisdiction, within the jurisdiction of this Court.

The basic question thus present, as I understand it, is whether Callahan, who, for my purposes and not for jury purposes, may be considered, and was, according to that testimony, if it is to be believed, and on this motion it must

[fol. 156] be given a reasonable construction, was under the old law an accessory before the fact; that is, he aided, abetted, counselled and induced those on board the vessel who, if the testimony is to be believed, were guilty of bringing the cargo of liquor into Delaware in violation of the tariff act, in that such importation was in violation of the National Prohibition Act. Being such accessory before the fact, the case comes under Section 550 of the Criminal Code of the United States, which reads thus: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal," thus abolishing the distinction between principals and accessories before the fact.

Under Section 3 of the notes of the decisions under this Section 550 of title 18 of the Statutes of the United States, Criminal Code, Section 332, it has been held by numerous decisions that "this section abolishes the distinction between principals and accessories and makes all principals whether the offenses are felonies or misdemeanors, and the acts of the principal become the acts of the accessory or aider"—that is vital—"and the acts of the principal become the acts of the accessory or aider, and he may be charged as having done the act himself and be indicted and punished accordingly under this section."

Now, Section 5 of the notes to Section 550 makes this decision:

"It is not necessary that one who aids and abets the commission of the crime shall be present when the crime is committed, to sustain a conviction under this section."

Section 9 of the same notes shows that by reason of this section it is not necessary, first, to convict or even indict [fol. 157] the person who actually committed the offense, and here, let us say, the captain of the vessel.

Section 28 makes it clear that the accessory before the fact, that is, the person who aided and abetted by inducing or counselling the commission of the offense, may be indicted at the option of the pleader, at the option of the district attorney in this case, either as principal or as aider and abettor.

Consequently, at the proper time I shall hold in this case that the jury may find, if that they conclude the evidence

so warrants, the defendant in this case guilty either under count 1 or count 2, but not under both counts. That making the aider and abettor present where the crime is committed puts Callahan in contemplation of law, if the evidence given in this case is to be believed, aboard the vessel here coming into the Delaware capes, puts him aboard the vessel with the intention disclosed by him in conversation with Gilhooley, if Gilhooley's testimony is accurate and is to be believed.

The law is further set forth in Corpus Juris 16, page 163, in this language, under the caption "Offenses by persons beyond safe boundaries," and whether the safe boundaries are international boundaries is of no importance or significance in the case in the statement of the law. Corpus Juris says this: "Although the general rule is that a state or sovereignty can not punish for offenses committed beyond its territorial limits, it may pass laws in regard to its own citizens which will be binding and obligatory on them when they are beyond such limits, and for the violation of which they may be punished in the courts, whenever it can find them within its jurisdiction." Now then, "aside from this, where a person being beyond the limits of a state or country, puts in operation a force which produces a result and constitutes a crime within those limits, he is as liable to indictment and punishment, if jurisdiction can be obtained of [fol. 158] his person, as if he had been within the limits of the state or country when the crime was committed."

Now then, at one time in Section 550 of Title 18, Criminal Code, Section 332, there was a distinction between a crime committed through an innocent agent and one through an agent who was conscious of the crime that was being committed by him. That statement was this, as stated by Corpus Juris:

"Through an innocent agent. It is true of crimes committed by means of an innocent agent. Where a person outside of a state procures a crime to be committed within the state by means of an innocent agent, he is responsible in such state as principal."

The next paragraph is captioned "Through Criminal Agent." Then it goes on to say:

"By the weight of authority, where a person outside of a state procures a felony to be committed in the state by a

criminal agent, or conspires with others in the state to commit a crime, he is an accessory before the fact that triable as such in the state where he instigates or suggests the crime, and not in the state where the crime is committed by the principal."

That was the original law. Here is the exception:

"Unless by express statutory provision. This rule does not apply, however, to misdemeanors in which there are no accessories, but all who take part are principals, whether present or absent; and if a person in one state procures the commission of a crime of that grade in another state, through even a guilty agent, the procurer is regarded as a principal in the offense, and as being present in the con- [fol. 159] templation of law where the crime is committed, and answerable there for the crime."

Now, while that deals with misdemeanors only, and while the charge in the indictment in the case at bar is one of felony, yet it is obvious, I take it, that since Section 550 of Title 18 of the Statutes of the United States has abolished the distinction between accessories and principals and made all accessories principals, whether the crime charged is one of felony or a misdemeanor, then what is laid down in Corpus Juris as an exception to the rule, becomes here the dominant and controlling rule and principle of law, namely, that the principal is considered in contemplation of law as present where the crime is committed and there answerable for the crime there committed, notwithstanding he may have been personally present in some other state or some other sovereignty or some other nation when the crime was actually committed by his agents or co-conspirators.

8 R. C. L. summarizes the same principle of law with great brevity and with equal clarity. It there says, under Section 62, 8 R. C. L. 101:

"In several cases a question has arisen as to the jurisdiction of a crime where the accused, while in one state, set in motion a force which operated in another state, as where a shot is fired at a person across a state line or an injurious substance is sent to a person in another state with intent to injure him. In such cases the view has generally been

taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there, for if a crime is the immediate result of his act, he may be made to answer for it in its courts, though actually absent [fol. 160] from the state at the time he does the act, because he is constructively present, or present in contemplation of law, * * *"

I am well aware that the conclusion at which I have arrived and which I have stated, or attempted to state, makes subject to America's laws any person in any foreign country whatsoever who owns or outfits a vessel and loads her with goods that may not be legally imported into the United States and sends her out with a view of having those goods illegally imported into the United States, is guilty under the tariff act, regardless of the nationality of that person and regardless of his residence and regardless of whether he has ever been at any time in the United States.

Of course the jurisdiction requires for its trial his presence at the time of trial in the jurisdiction of the court which is trying him. Of course a person can not be tried in his absence. Here all the factors essential to the jurisdiction of this court are present.

For these reasons the motion is denied.

Mr. Halle: If it please the Court, there is just one further motion I have to make, but I do not know whether your Honor cares to hear argument on it or not.

The Court: Tell me the motion.

Mr. Halle: The motion is that the offense as charged is an offense under the National Prohibition Act.

The Court: That has been dealt with in the order of demurrer. The demurrer disposes of that and you have no right to renew, and that is the law of the case. I understand your motion to be one of the grounds stated in your demurrer. I will make the same ruling and grant you an exception.

[fol. 161] Mr. Halle: Exception.

Mr. Green: If the Court please, we feel, in view of the evidence, it is not necessary for us to present any evidence, and we will not present any evidence in defense.

Defendant rests.

Prayers

The Court: Have you any prayers?

Mr. Green: Yes, your Honor. If it please the Court, I think the Court has already indicated—we ask the Court to instruct the jury to return a verdict on both counts for the reasons we have already argued. I will go through all of them if you want me to.

The Court: Well, unless I have missed some, I do not care to have you go through them. If you want to state them, not argue them, state them. They will check up my recollection.

Mr. Green: On the first ground that the state has failed to prove that the act was done fraudulently and knowingly.

The Court: That is denied.

Mr. Green: On the second ground that failure of the Government to show that there is an importation, on the ground that an importation means that such merchandise must pass a customs barrier. Now, will the Court permit me just a moment on that, for fear there may be some error creeping into this?

After your Honor's ruling of yesterday in connection with the Cunard v. Mellon case, I have reviewed that rather minutely; and I think there is possibly some error in our consideration of that case. Of course, the Keck case and the other cases I cited, are certainly opposed to the Cunard v. [fol. 162] Mellon case: I mean they go further. Now, in the Cunard v. Mellon case, that was a case of importation under the National Prohibition Act, and you may note before the Court passes upon the word "transporting" and "importation," there is one other additional word. I have forgotten it, but it is immaterial. The Court takes up that it is contended that such should have some technical meaning, or words to that effect, apparently indicating that the position of the Keck case was argued before the Supreme Court in that particular instant case. But the Court goes on and reviews the legislation as used in the Eighteenth Amendment and in the Volstead Act, and holds it is not necessary in that case to give those words any technical meaning. But that does not destroy, I submit, and does not override the force of the Keck case, and that the Keck case which has been recited in so many authorities and even down to the present day cited, and as I think we have indicated, cited by your

Honor in disposing of the demurrer, is still given force, and that the word import under the custom law, not under the prohibition law, does have the definite technical meaning as given to it by the Keck case.

The Court: I understand your grounds, but that will also be denied, primarily upon the authority of the Cunard v. Mellon case, but bearing in mind also, contrary to the conditions that prevailed in the Romano case, 9 Federal Circuit, here there was something in addition; here there was put in evidence something in addition to the papers of the vessel, namely, Gilhooley's testimony with respect to Callahan's statement. Now, were Callahan's testimony not in this case, there might be quite a different legal conclusion arrived at, but we must bear in mind Gilhooley's testimony. The jury may believe it or not, if they see fit. For my purpose, I can [fol. 163] not do otherwise than send it to the jury. I have to accept it to the extent of allowing the jury to pass on it, and consequently there is that distinction between this and the Romano case.

There is also that same distinction here between the case at bar and the Perillo case, where reliance had to be placed solely on labels which were foreign, which were contradicted so far as that case was concerned, by the defendant, who testified that he got the liquor, I think, within the limits of the United States from some person who reported that he had gotten it on the outside, but there was nothing in that case but the labels to indicate importation. That is not the case here. Now, your next ground.

Mr. Green: The next ground is the failure of the Government to show that Callahan as a principal imported merchandise in violation of law.

The Court: I deny that on two grounds. The testimony of Gilhooley which showed Callahan to be an accessory before the fact, and Section 550 of Title 18 of the Statutes of the United States.

Mr. Green: The next ground being akin to the former, that up- the evidence of the Government produced, failing to show that Callahan assisted in importing in violation of law.

The Court: The same ruling, for the same reason.

Mr. Green: Now, as to prayers proper, then. I ask that the jury be instructed that they can not find the defendant guilty under the second count.

The Court: Mr. Wales, which count do you now rely upon?

Mr. Wales: I think your Honor is right on that point.

[fol. 164] The Court: Then which one do you elect now to stand upon?

Mr. Wales: Well, my understanding in your Honor's discussion about the case is that you would instruct the jury that he might be found guilty of either but not on both.

The Court: That would be the proposition, but I gathered from your statement awhile ago that you were relying upon one or the other. I had an impression which was probably erroneous.

Mr. Wales: I think your Honor is entirely correct in saying that the jury could find under the evidence a verdict of guilty, but not under both counts.

The Court: Since they are for the same offense, let us see where you will be. There are many cases which hold that a verdict of guilty upon one count can not be sustained where a verdict of not guilty on a substantially similar count for the same offense is made. If you stand on both counts and I have to tell the jury to find a verdict of not guilty on one count, does that not necessarily, under the principle I have just stated, make it mandatory for me to tell the jury that "since you must find a verdict of not guilty on one count, and since the same offense is charged in the other count, you can not find the contrasting verdict, and hence your verdict must be not guilty on both." Where are you on that?

Mr. Wales: Now, if your Honor will remember the Jablonski case, the charge there was not only the sale of whiskey but aiding and abetting.

The Court: I think you may elect which count you will proceed on, Mr. Wales.

Mr. Wales: If we have to elect, I will elect to stand on the aiding and abetting.

[fol. 165] The Court: That is the first.

Mr. Green: Then I understand that you rely on the first?

The Court: Yes.

Mr. Green: Do I understand that means a nolle prosse of the second count?

The Court: In effect, yes.

Mr. Green: If it please the Court, we ask the Court to instruct the jury that under the law and the indictment, it is

necessary that the Government show that the alleged act of importation was fraudulently and knowingly done.

The Court: That is all right.

Mr. Green: Secondly, we ask——

The Court: Are you going to give me a memorandum of this importation, knowingly and fraudulently done?

Mr. Green: I have nothing more. I ask the Court to charge the jury that it is necessary that there shall be an importation in this case established by the evidence of the Government, and as a prayer I include my other motion, that importation means that it must pass a customs barrier, and that there is no importation unless the merchandise or the vessel with the merchandise has passed a customs barrier.

The Court: The jury will be instructed that importation is essential, but I shall decline for the reasons already stated.

Mr. Green: I will state frankly to your Honor I am not fully aware of the propriety—I mean I am fully aware of the propriety but not of the Federal law, as to my next motion; that is, I ask the Court to instruct the jury that the [fol. 166] failure of the defendant to testify shall not be considered as any indication of guilt, nor can that fact be commented upon before the jury.

The Court: What is your doubt?

Mr. Green: I know that that is our positive State law. Now, whether that positive State law applies in this court I am not aware. We have a definite statutory enactment in Delaware on that decision.

The Court: My impression is that there is a Federal statute about that. The principle applies there and I think it is under a Federal statute.

Mr. Green: Our next prayer is on a presumption of innocence, which your Honor will charge.

The Court: The usual charge?

Mr. Green: Yes. In addition thereto, we ask the Court to charge on the ground of circumstantial evidence, especially as relates to the act of importation, that the rule as applied to circumstantial evidence must be such that it is inconsistent with innocence, and that no other reasonable hypotheses or hypothesis can be drawn from the testimony other than that of guilt.

The Court: All right.

Mr. Green: My learned friend calls my attention to this, that the indictment charges him, and therefore it will be necessary for the Government to show, that he did both things: That he did fraudulently import and did assist in importing. I think in that connection it would be my duty for the purpose of clarity to call your Honor's attention to the fact that while the indictment alleges that he brought it in without a permit and without paying the duties, that such is out of the——

[fol. 167] The Court: I wonder whether you would be benefited.

Mr. Green: I will not insist upon it. In addition thereto the indictment charges him with importing merchandise, and then there is a detailed description of the various kinds of liquor alleged in the indictment, and that there being no proof of that fact according to the evidence of Gilhooley other than as to malt, that such can not include more than the malt liquors.

The Court: Any prayers, Mr. Wales?

Mr. Wales: I will ask your Honor to charge, of course, in the language of Section 550 about the liability of a principal and one who counsels and advises and aids and abets. I certainly deny the application here of any doctrine of circumstantial evidence for the simple reason that the evidence here is not circumstantial. It is direct, from this defendant's own admission under the evidence that he did procure the boat and did load it with liquor, that he did sail from Pierre-Miquelon, and he did put the pilot on board to pilot her into the Delaware Capes, so there is no circumstantial evidence doctrine in that.

I also call your Honor's attention to the fact that not only the statute itself but the indictment framed under it charges the defendant with importing and bringing into the territorial waters of this District of Delaware, and I believe that the words "bringing into" were added to this statute. It is not in the original statute but it was put into the statute after the decision in the Keck case. However, we are not limiting the evidence here to actual importation.

The Court: I shall charge the jury that if they find the vessel had come into Delaware Bay, into the territorial waters of this jurisdiction, and they find that Gilhooley's [fol. 168] testimony with respect to the conversation of Callahan is true and accurate, that that was an importation

within the meaning of the statute, so you might as well know that now.

Mr. Green: Of course, while the statute refers to both importation and bringing in, it involves the same transaction, only different ways of committing the offense.

Mr. Halle: I ask the Court to charge that if the jury find that Callahan was not in St. Pierre at the time of the loading of the vessel, their verdict must be "Not guilty."

After Recess

Charge of the Court

Morris, J.:

Gentlemen of the Jury: The Government of the United States has charged the defendant, John T. Callahan, alias Chic Callahan, alias Blake, with a violation of a Statute of the United States. What statute? Where do we turn to find the offense with which Callahan is charged in the first count in the indictment filed against him in the case now before us? I say the first count because the Government has dropped, to use a non-technical term, the charge made in the second count of that indictment. So in your deliberations you will omit entirely any consideration of count two because that is now out of the case by the action of the Government.

Mr. Wales: May I ask your Honor if there has not been some misunderstanding? The second count is the aiding and abetting count, is that not right?

[fol. 169] The Court: I think not. Will you not make certain?

Mr. Wales: I just want to be clear on that. Yes, sir, I am wrong. I beg your Honor's pardon.

The Court: I was not absolutely certain myself. That is the reason I referred it to you.

The first count charges that about the tenth of November, 1927, Charles Newton, alias Charles R. Brown, and Albert Knickle, did unlawfully, wilfully and so on, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon into the territorial waters

of the District of Delaware, into the town of Lewes and State of Delaware, certain merchandise, to wit, liquor containing more than one-half of one per cent. of alcohol by volume and fit for use for beverage purposes, in that the defendants imported and brought and assisted in importing and bringing into the United States, such liquor in violation of Section 3 of Title 2 of the National Prohibition Act, and that the "Said defendants brought into the United States in violation of the Provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922, the liquors aforesaid, and that they brought them into the United States in violation of Section 3, Title 2 of the National Prohibition Act."

All that I have said applies to Brown and Knickle. The first count of the indictment goes on further and says this:

"That the defendant Callahan did at that time unlawfully, wilfully, knowingly and feloniously aid, abet, insite, counsel and procure Newton, alias Brown, and Knickle, to commit and in committing in the manner and form aforesaid, the [fol. 170] offense aforesaid, contrary to the form, force and effect of the Act of Congress."

That charge becomes, I hope, somewhat clearer when we turn to the Tariff Act of 1922, which is the act with which this defendant is charged, that of committing a violation. That act is this, and you will notice its rather unusual wording and why two statutes have to be referred to in order to make the complete offense. The Tariff Act says:

"If any person fraudulently or knowingly imports or brings into the United States or assists in so doing any merchandise"—what?—"contrary to law."

So that the prohibition or inhibition against the importation is here charged to be contrary to what law? Contrary to the Volstead Act or the National Prohibition Act? The particular offense charged is that the Tariff Act was violated in that something was brought in which was not permitted under the law to be brought in.

Section 3 of Title 2 of the Volstead Act referred to in the indictment reads thus:

"No person shall"—on or after the date when the Eighteenth Amendment goes into effect—"Manufacture, sell,

barter, transport, * * * any intoxicating liquor except as authorized in this chapter * * *"

So that the offense charged is in bringing liquor into the United States when its importation was prohibited by law.

There is no evidence that the defendant Callahan was in the vessel, the "Charles Edward," when she came into the Capes and came into Delaware Bay, so whether the [fol. 171] vessel was ever in Delaware Bay or not is one of the many things for your determination. There is no allegation and no evidence that Callahan was on board that vessel when she came into Delaware Bay, so you might well inquire in your deliberations, "Well then, how can Callahan be guilty of the Commission of the crime in the District of Delaware?" For the reasons I stated to counsel for the defendant this morning in denying their motion.

In order that I may be reasonably sure that you fully understand that I will repeat some of the things I said to counsel for the defendant this morning. The old law recognized distinctions in the offenses as to whether a person was actually present at the time and place of the commission of a crime, or whether he was not present physically at the time and place of the commission of the crime. It also recognized the difference between an accessory before the fact, principal in first degree and principal in second degree. All those things were abolished by a statute of the United States, which is Section 550 of Title 18 of the United States C. A., one form of the Statutes of the United States, which reads thus:

"Whoever directly commits any act constituting an offense defined in any law of the United States"—and the coming words are the important ones—"or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Now there are certain consequences or corollaries that flow from that statute. One is that that section abolished the distinction between principals and accessories and make both principal and accessory principals. And there is another consequence, that the acts of the principal, the actual principal, become the acts of the accessory or aider,

and he, the aider or the man who procured or induced the man who actually did the crime, to do the crime, may be charged as having done the act himself and be indicted and [fol. 172] punished accordingly under Section 550 which I have just read to you.

Another incident of the statute is that it is not necessary that one who aids and abets the commission of a crime shall be present when the crime is committed to sustain a conviction, if he was under the old law an aider or abettor or an accessory before the fact. Nor is it necessary that the person who actually committed the crime shall be first convicted, but the accessory or the one who procured its commission or aided or abetted in its commission shall be found guilty. Consequently, if you shall find in this case that the testimony of Gilhooley is true and correct and that the "Charles Edward" sailed into the Capes and into the jurisdiction of this Court, that is, in the District of Delaware, into that part of Delaware Bay which lies within the boundaries of this district, that is, the State of Delaware; that the "Charles Edward" had on board intoxicating liquor; that it was being brought in in violation of the Volstead Act, having on board intoxicating liquor of a character described in the indictment, and that the purpose and intent with which that vessel left the port from which it sailed was to bring that in in violation of the Volstead Act, and that this defendant Callahan aided or abetted or procured or induced that importation, illegal importation, then your verdict may be and should be guilty.

You cannot find any aiding or abetting or assisting by Callahan from anything that he did at Cape May. What he did there has not been shown to be an aiding or abetting or assisting of the vessel or those on board in the commission of this crime. So that before you can find that Callahan did induce, procure, aid or abet or bring about the importation into the District of Delaware, you must find it from the testimony of Gilhooley, and from that part of Gilhooley's testimony which narrated what Callahan said to him about [fol. 173] what he, Callahan, did at St. Pierre-Miquelon and at Lunenberg, near Nova Scotia or the Gulf of St. Lawrence.

If you find from that testimony of Gilhooley, or any other evidence in this case, that Callahan did procure this

vessel, did aid in loading her, did bring about in whole or in part her sailing for Delaware Bay laden with intoxicating liquors of the character whose importation is prohibited by the Volstead Act, then you would be warranted, I repeat, in finding a verdict of guilty.

With respect to importation I say to you that if you find that this vessel did sail into Delaware Bay with the intention, as disclosed, as stated by Gilhooley in his testimony, then there was an importation within the meaning of the Tariff Act, Section 593-B.

The Circuit Court of the United States in Cunard Steamship Company v. Mellon, 262 U. S., at page 122, said:

"Importation consists in bringing an article into a country from the outside. Entry through a custom house is not of the essence of the Act."

Before that importation may be considered by you unlawful you must first find, however, that the intent with which it was brought in was an unlawful intent, a fraudulent intent, and that it came in and that this defendant knew that it was coming in. If you find it was a fraudulent intent you may consider what fraudulent means. I find Webster's Dictionary gives as a definition for fraud the following: "By deception, deliberately practiced, with a view to gaining an unlawful or unfair advantage." It does not have to be a fraud viewed from the standpoint of the French islands off Nova Scotia alone, but it may be from the standpoint of the Tariff Act as to whether the importation was [fol. 174] intended to be made in violation of the Tariff Act.

Of course, if you find that Callahan had nothing to do with the loading or purchasing of the vessel or her coming out on this voyage on which she was when she was arrested, then of course your verdict must be not guilty.

In determining whether the defendant is guilty or not guilty, you must determine that from the evidence in the case, and that alone, and in arriving at that conclusion you are not permitted under the law to draw any inferences or deductions of guilt because the defendant did not testify. The law gives him that privilege and says that no inferences of guilt may be drawn from this act. A reason for that—one of the many reasons for that may be this, that the

burden of proving guilt beyond a reasonable doubt is upon the Government, and upon that testimony you must decide whether or not the defendant is guilty or not guilty, and his failure to testify may be taken into consideration by you in that particular.

This defendant, like all other defendants, is clothed with a presumption of innocense, and that presumption continues and prevails unless and until you find that presumption has been overcome and overthrown by the testimony in the case. Before you may find a verdict of guilty you must find to your satisfaction that all the elements of the crime had been proved beyond a reasonable doubt. You must find, for instance, in this case, before you can find a verdict of guilty, that Callahan did aid, abet, incite or procure, or aid in bringing about this voyage of the vessel with intent knowingly and fraudulently to import liquor, contrary to law, into the United States.

By a reasonable doubt I do not mean a fanciful or a whimsical doubt, or a doubt that may arise in your mind, because you are human and fear that perhaps punishment may fol- [fol. 175] low, but I mean by reasonable doubt such substantial doubt as would deter you and give you pause in the more serious affairs of your own business.

Are there any exceptions?

EXCEPTIONS TO CHARGE

Mr. Green: We except to that part of your Honor's charge that if Callahan had a part in the outfitting or the loading of the boat for the purpose of unlawfully entering the territorial waters of the United States that then he——

The Court: If I made that statement, then I did not go far enough.

Mr. Green: I may not have it in the exact words, your Honor, but it was that part of your charge where, if he had a part in the outfitting and the loading of the boat at Lunenburg and at St. Pierre for the purpose of illegally importing liquors into the territorial waters in the District of Delaware, then he could be found guilty. We except to that part of your charge.

The Court: Inasmuch as I do not recall with distinctness my exact words, probably I had better be clear, even at the expense of repetition.

If the jury finds that Callahan aided, abetted, counseled, commanded, induced or procured the importation of the liquor on board this vessel into the United States, then he may be found guilty of the offense charged, provided they likewise find that that was fraudulently done and knowingly done. You except to that?

Mr. Green: We except to that. And we except to the enunciation by your Honor that the act of the principal becomes the act of the accessory, the interpretation of that particular section; and further, that if there was a steaming, [fol. 176] referring to the vessel, into Delaware Bay, that such is an importation in violation of the Customs Law.

The Court: I shall have to repeat that.

Mr. Green: I thought I had that clear. Your Honor immediately thereafter read the Cunard Case. I think those are the exact words.

The Court: There must have been a coming into the waters of Delaware Bay under the conditions narrated by Gilhooley. The mere bringing in, the mere importation, apart from the facts narrated by Gilhooley, does not constitute the offense with which this man stands charged. There must be the union of the two.

Mr. Green: Suppose I put it this way: We except to your Honor's interpretation of the meaning of the word "importation" as defined by your Honor and presented to the jury in that way. I think that will cover.

My learned friend calls my attention to this: An exception to the refusal of the Court to charge that if the jury finds that Callahan was not at St. Pierre, then he shall not be found guilty. I think he gave you a memorandum in a written prayer.

The Court: I decline to charge in the language submitted by Mr. Halle, but I did charge—and if not, I now charge that they must find, before they can return a verdict of guilty, that Callahan did aid, abet, counsel, command, induce or procure the commission of the crime which was committed, if they find a crime was committed.

Mr. Green: I think I already have an exception to that, so that may cover it, on the failure of the court to instruct the jury to return a verdict of not guilty.

[fol. 177] The Court: For the reasons stated in your motion.

Mr. Green: I make this further exception to your Honor's admitting in evidence the testimony of Gilhooley and the papers found, because of the failure to prove an importation. I reserve that all along the line.

The Court: All right.

Mr. Wales: Will your Honor instruct the marshal to take in the exhibits?

The Court: If the jury wants them.

(At 2:35 o'clock P. M. the jury retired.)

(At 4:05 o'clock P. M. the jury returned for further instructions.)

The Foreman: Your Honor, there is a question that was not quite clear in the minds of the jury.

(Hands paper.)

The Court: I have received the following note from the jury: "Ask the Judge to repeat his portion of the charge wherein he said to the effect that what took place at Cape May between Gilhooley and the defendant was not to be considered."

FURTHER INSTRUCTIONS TO JURY

The Court: That is not quite right. What I said was this: What Callahan said to Gilhooley at Cape May is of vital importance. It is the crux of the case. Without it, as I recall the evidence, you could not find a verdict of guilty. As a matter of law I should have to direct you to find a verdict of not guilty, but for the testimony of Gilhooley and the testimony of Hickman to the extent that [fol. 178] it corroborated Gilhooley. What I said was this:

The actual act, or rather what I intended to convey—and I may not make it clear to you now the first time, but if I fail to make it clear, if any one of you fail to understand it, then if you will tell me I will keep at it until I have made it plain. It is a little difficult to express, but it is this: We were inquiring whether a man could be convicted in the United States for an act which he did outside the United States, and what I attempted to make clear was that it was not something, we were not trying the defendant for anything that he did in the United States, anything

that he did at Cape May, any wrongful act that he did there; the wrongful act, so far as the physical act was concerned, was the procuring of the commission of an offense or crime is concerned, so far as the evidence shows in this case, if done by the defendant at all, was done up at the French islands, wherever they are, off the Gulf of St. Lawrence.

Let me try to state it another way. The defendant Callahan, so far as you and I are concerned, committed no crime at Cape May. Nothing that he did there by way of an act aided or abetted or procured the commission of this importation, if importation there was. But what is of vital import in this case, of crucial import, is what this defendant said at Cape May to Gilhooley. You see, this defendant is charged with aiding and abetting the importation of intoxicating liquor in violation of the Tariff Act, in that importation was forbidden by the Volstead Act. Nothing that Callahan did at Cape May may be construed—no act of Callahan at Cape May may be construed as constituting any act in such aiding or abetting or importation, but what Callahan said at Cape May that he had done up at St. Pierre-Miquelon and Lunenberg is of vital importance, if [fol. 179] you believe that he said it, for any act that he did by way of aiding and abetting the importation with which he is charged was done by him up at St. Pierre-Miquelon, if done at all, or at Lunenberg.

These acts, if they procured or induced or aided or abetted an unlawful importation of liquor, if he did those acts at St. Pierre-Miquelon and at Lunenberg, and those acts up there induced or procured or aided or abetted this importation of liquor, and there was an importation of liquor in conformity with his statements to Gilhooley, then you may find him guilty. If he did not say to Gilhooley what Gilhooley says he said to him, then you can not find him guilty.

Now, I do not know whether I have even now made clear the distinction which in law is a clear one, namely, that you are vitally concerned with Gilhooley's testimony, as to what Callahan said to him. If Callahan did not say to Gilhooley what Gilhooley said that he did, then your task is ended and your verdict should be not guilty. If Callahan said to Gilhooley that which Gilhooley said Callahan said

to him, Gilhooley, and you accept Callahan's statement thus reported to you as representing what Callahan did at St. Pierre-Miquelon and Lunenberg, and you find also that there was an importation, a bringing in of liquor into the Delaware side of Delaware Bay, with the intent as stated by Callahan to Gilhooley, if you accept Gilhooley's testimony, then your verdict should be guilty.

If that distinction still is not clear, see to it that I keep at it until I make that distinction clear, because it is of vital import.

(The jury again retired at 4:12 o'clock P. M.)

(The jury returned to the court room at 4:40 o'clock P. M.)

[fol. 180] VERDICT

The Clerk: Gentlemen, have you agreed upon a verdict?

The Foreman: Yes.

The Clerk: How do you say, Mr. Foreman, do you find the defendant John T. Callahan, alias Chic Callahan, alias Blake guilty or not guilty in manner and form as he has been indicted?

The Foreman: Guilty, and we ask the mercy of the Court.

MOTIONS TO SET ASIDE VERDICT

The Court: Have you gentlemen any applications?

Mr. Halle: If the Court please, I have a number of motions to make. Mr. Green is not here and I am not familiar with the practice here. I ask the Court to defer sentence for a few days so that I can get my motions in order.

The Court: What are your motions?

Mr. Halle: I want to raise the question of whether this comes under the customs statute.

The Court: I passed upon that upon the demurrer. You may raise it but I am ready to pass upon it now.

Mr. Halle: The only motions I have right now, I ask that the verdict be set aside on the ground that it is against

the weight of evidence, and upon the ground that the case of the Government failed——

The Court: What you want is a motion for a new trial?

Mr. Halle: Yes.

[fol. 181] The Court: The usual practice in regard to sentence is to defer it four days. The bail will have to be increased.

Mr. Halle: Your Honor, I intend to have the increased bail in the morning.

The Court: The defendant will have to stay in the custody of the Marshal until then.

Mr. Halle: Has your Honor any amount in mind now?

The Court: But for the recommendation of the jury that the Court should extend mercy, I should ask for $25,000 bail pending sentence. What is the bail he is under now?

The Clerk: $5,000

The Court: What do you say about bail, Mr. Wales?

Mr. Wales: I think the defendant should give a very substantial increase in the bail to warrant his being set at liberty at this time.

The Court: What sum would you suggest would be satisfactory to the Government?

Mr. Wales: Well, of course, I have no way of finding out what this man's ability may be in the way of furnishing bail, but I should say that it should be at least not less than $50,000 or $75,000; $50,000 would be satisfactory.

The Court: I am afraid you are a little high, Mr. Wales, in view of the recommendation of mercy.

Mr. Wales: I do not know, of course, anything more than rumors about this man so far, but I want to be sure he will be here.

[fol. 182] Mr. Halle: On that question, the defendant has lived in South Jersey for practically all his life, lives there with his wife and four children, and when he heard about this indictment here he came here and surrendered and we named bail, if I recall correctly.

The Court: Let the bail be fixed at $15,000. Perhaps you can get it through local people tonight and I will be available at any time to take the bail.

(Whereupon, at 4:50 o'clock P. M., the Court adjourned.)

(Here follow Government's Exhibits Nos. 1, 2, 3, and 4, side folios 183-190.)

GOVERNMENT'S EXHIBIT No. 1

~~[illegible]~~
Bord Ex "A" for Ident

DOUANES FRANÇAISES

PORT DE SAINT-PIERRE.

N° du registre d'inscription sommaire.

MANIFESTE de Sortie

Ou déclaration générale du chargement du navire Charles Edward

pavillon anglais, *Capitaine* Albert Knittle *jaugeant* ton. 100^m^

venant de Saint Pierre *à destination de* Boston - Lincoln Mass

Lequel manifeste est fourni aux termes des articles 5, *titre II, de la loi du* 22 août 1791, 61^me^, *titre II, de la loi du* 4 germinal an II.

L'exactitude de son contenu est affirmée par ledit Capitaine, sous les peines édictées par les lois précitées

MARQUES et NUMÉROS des colis.	NOMBRE ET ESPÈCES DES COLIS (en chiffres et en toutes lettres) et nature des marchandises.	REGISTRE où sont consignées les opérations ultérieures.	
		TITRE	NUMÉROS
	(Ne porter qu'un seul article sur chaque ligne, et mettre en tête le nom du consignataire).		
	1 Lot divers marchandises Lc Lincoln Mass St Pierre 29 octobre 1924 Le Capitaine Albert Knittle		

Vu au bureau :
Saint Pierre le 27.10.24
Le Chef du Service des Douanes soussigné atteste
L'Exactitude des Déclarations

SERVICE DES DOUANES SAINT-PIERRE MIQUELON

184

GOVERNMENT'S EXHIBIT No. 2

ORIGINAL Govt Exhibit D for Identification
Govt Exhibit No 2

THE GREAT WEST WINE CO.

LOUIS HARDY
ST. PIERRE-MIQUELON

St Pierre Miquelon October 27th 1934

Sold to Loaded on the Charles Edwards

Cases	Kegs	Gals.	MERCHANDISE @	@	Amount
	295	Kegs	Islay Sheriffs - 2872 3/4 gals		
		28	bags Bonthe High. dry		
62	cases		Bonthe do		
25	-		apricot Brandy		
10	-		Kummel		
10	-		Rock. Brandy		
10	-		Creme de Menthe vert		
10	-		Dubonnet		
17	-		Sparkling Burgundy -		
144	295	28	total loaded 295 Kegs Islay sheriffs 144 cases assorted liquors 28 bags Bonthe high. dry 5 cases beer for the Crew		

Received in Good Order:

No 30017

Albert Hardy

GOVERNMENT'S EXHIBIT No. 3

A. 7
No.

REPORT OUTWARDS

PORT OF Lunenburg N.S.

Contents in the (1) Charles J. Conrad Registered Tonnage 111

Registered in the Port of (2) Yarmouth N.S. with 7 men

Albert Knickle Master for this present voyage for (3) St Pierre Miq.

Cargo..... Tons Weight..... Tons Measurement.

..... Agent

Marks and Numbers	SHIPPERS	Quantity and Description of Goods	Value $	CONSIGNEES
		Ballast and Stores necessary to complete voyage Free & Duty paid		

NATIONAL REVENUE CANADA CUSTOMS AND EXCISE NOV 21 1928 Lunenburg N.S.

CUSTOMS AND EXCISE NATIONAL REVENUE CANADA OCT 20 1928 Lunenburg N.S.

Certified Copy

H. E. Mack

Collector of National Revenue

CUSTOMS CANADA COLLECTOR'S OFFICE FEB 18 1929 LUNENBURG N.S.

I, Albert Knickle Master of the vessel above named, do declare that the Contents above written, now tendered and subscribed by me, is a just and true account of all the Goods laden on board my vessel for the present voyage, and of the names of the respective Shippers and Consignees of the said Goods; and of the marks and numbers of the Packages containing the same.

Signed and declared before me at the Custom House, Port of Lunenburg the 20th day of Oct 1928

Albert Knickle
Master or Purser

J. E. Anderson Collector

(UNDER A PENALTY OF $400)

(1) Insert here "Ship" Steamship, Schooner, or as the case may be, and name of vessel. (2) Port and Country where registered. (3) Port and Country for which cleared

GOVERNMENT'S EXHIBIT No. 4

H
(25 Men)

NOTE—Any Erasure, Interlineation, or Alteration, in this Agreement, except in the case of Substitutes, will be void, unless attested by some Shipping Master, Officer of Customs, Consul, or Vice-Consul, to be made with the consent of persons interested.

AGREEMENT.

AGREEMENT OR ARTICLES AND ACCOUNT OF CREW

DEPARTMENT OF MARINE AND FISHERIES

(CANADIAN FOREIGN SEA-GOING SHIP OR CANADIAN HOME-TRADE SHIP.)

"Canadian Foreign Sea-going Ship" shall include every ship registered in any of the Provinces of Quebec, Nova Scotia, New Brunswick, British Columbia or Prince Edward Island employed in trading or going by any known ocean route or place in Canada, and every place or places out of Canada.

"Canadian Home-trade ship" shall include every ship registered in either of the said Provinces, employed in trading or going from any place or places in either of the said Provinces to any other place or places in any other of the said Provinces.

EXECUTED IN TEN PAGES

	$	cts.
Engagement Fee		
Discharging Fee		

Name of Ship	Official Number	Port of Registry	Port No. and Date of Registry	Registered Tonnage	Managing Owner: Name	Managing Owner: Address
Charles Edward	138741	Gaimard	1910	41	Rudolph LeBlanc	Wedgeport

MASTER: NAME	No. of Certificate	Address	Declared place of First Engagement of Crew, including Name of Shipping Officer
Albert Knickle		Lunenburg N S	20/10/27 Lunenburg N S

Scale of Provisions to be allowed and served out to the Crew

	AMOUNT
SUNDAY	
MONDAY	
TUESDAY	
WEDNESDAY	
THURSDAY	
FRIDAY	
SATURDAY	

Here any stipulations for changes or substitutions of any article for another may be inserted.

The several Persons whose names are hereto subscribed, and whose descriptions are contained below, and of whom three are engaged as sailors, hereby agree to serve on board the said ship, in the several capacities expressed against their respective Names, on a Voyage from Lunenburg N.S. to (or, which ship is to be employed) any ports or places between the limits of 65 degrees north and 60 degrees south Latitude trading or freighting & and for as required within the above named limits and back to any port or places in the Dominion of Canada to load and/or discharge a cargo and/or for orders and thence to a final port of discharge in the Dominion of Canada

Period of time six (6) Calendar months

And the said Crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective Duties, and to be obedient to the lawful Commands of the said Master, or of any Person who shall lawfully succeed him, and of their Superior Officers in everything relating to the said Ship and the Stores and Cargo thereof, whether on board, in boats, or on shore; in consideration of which Services to be duly performed, the said Master hereby agrees to pay to the said Crew as wages the sums against their names respectively expressed, and to supply them with Provisions, according to the Annexed Scale; And it is hereby agreed, that any Embezzlement or wilful or negligent Destruction of any part of the Ship's Cargo or Stores shall be made good to the owner out of the Wages of the Person guilty of the same: And if any person enters himself as qualified for a duty which he proves incompetent to perform, his Wages shall be reduced in proportion to his incompetency: And it is also agreed, that the Regulations which, in the paper annexed hereto, are numbered[3] are adopted by the parties hereto, and shall be considered as embodied in this Agreement: And it is also agreed, that if any member of the Crew considers himself to be aggrieved by any breach of the Agreement or otherwise, he shall represent the same in a quiet and orderly manner to the Master or Officer in charge of the ship, who shall thereupon take such steps as the case may require: And it is also agreed that[4] The crew shall work cargo and/or ballast when and where required

[2]The authority of the Owner or Agent for the allotments mentioned within is in my possession.

.....Shipping Master.

6. This is to be filled up if such an authority has been produced, and such authority may be in the Form F in this Schedule.

In witness whereof the said parties have subscribed their names hereto, on the days against their respective Signatures mentioned.

Signed by Albert Knickle Master, on the 17 day of Oct 1927

Date of Commencement of Voyage	Port at which Voyage Commenced	Date of Termination of Voyage	Ship at which Voyage Terminated	Date of Delivery of Lists to Shipping Master
Oct 20 1927	Lunenburg N.S.			

These Columns to be filled up at the end of the Voyage.

I declare to the truth of the entries in this Agreement, delivered to the Shipping Master at ....., on the.....day of....., 19.....

.....Master.

1. Here the voyage is to be described, and the places named at which the ship is to touch, or if that cannot be done, the general nature and probable length of the voyage is to be stated.
2. Here state probable number of days' employment, as mentioned in the Act, for the voyage and period of engagement.
3. Here are to be inserted the numbers of any of the Regulations for preserving discipline indorsed in this Schedule which the parties agree to adopt. If any of them are so adopted a copy of the Regulations is to be kept annexed to the Agreement.
4. Here any other stipulations may be inserted to which the parties agree, and which are not contrary to law.

N.B.—This form must not be varied from. No leaves may be taken out of it, and none may be added or substituted. If more men are engaged during the Voyage than the number for whom signatures are provided in this Form, an additional Form should be obtained and used.

30480—11-26—1,000

(Ten pages)

2

Name of

PARTICULARS

Reference No.	SIGNATURES OF CREW	Age	* Nationality (If British, state birthplace.)	(1) Port of Engagement Address, and (2) Home address. N.B.—Both to be inserted. The Home Address is the one to which communications should be made in the event of the death of the Seaman.	Ship to which he last served, and Year of discharge therefrom — Year	Ship to which he last served, and Year of discharge therefrom — State Name and Official No. or Port she belonged to	Date and Place of Signing this Agreement — Date	Date and Place of Signing this Agreement — Place
1	~~Robert Rowsell~~		British	(1) Lunenburg N.S. (2) Do	1927	Ida M Zinck	17/10/27	Lbg
2	~~Wolfgang~~	23	"	(1) Lunenburg (2)		John McKay	20/10/27	"
3	Charles Gouroff	33	"	(1) Lunenburg (2) Do		Gaspe Fisheries	20/10/27	"
4	Austin Knickle	28	"	(1) Lunenburg (2) Blue Rocks		Ida M Zinck	"	"
5	Charles R. Brown	48	"	(1) Lunenburg (2) Halifax		J H Clouston	20/10/27	"
6	Ray Knickle	30	"	(1) Lunenburg (2) Do		Robert J Knickle	"	"
7	Joe Kaufman	41	"	(1) Lunenburg (2) Montreal		—	"	"
8				(1) (2)				
9				(1) (2)				
10				(1) (2)				
11				(1) (2)				
12				(1) (2)				
13				(1) (2)				
14				(1) (2)				
15				(1) (2)				
16				(1) (2)				
17				(1) (2)				
18				(1) (2)				
19				(1) (2)				
20				(1) (2)				

* If a British Subject, state Town or Country of Birth, and if born in a Foreign

† The signature of Engineers not employed on the Propelling Engines and Boilers should be described here and in the Certificate of Discharges as Second Officers, Deckhands, Refrigerating Engineers

‡ If any member of the Crew enters His Majesty's Service, the name of the King's Ship into which he enters is to be stated under the head of "Name of Vessel"

Ship Charles Edward

3

OF ENGAGEMENT

In what Capacity engaged	No. and description of Certificate (if any)	Date and Hour at which he is to be on board	Amount of Wages per month or Calendar Month	Amount of Wages Advanced upon or at the time of Engagement	Amount of Weekly or Monthly Allotment	Signature or initials of Official before whom the Seaman is engaged	PARTICULARS OF DISCHARGE, ETC. To be filled in by the Master upon the discharge, Death or Desertion of any Member of his crew: Date	Place	Cause	Balance of Wages paid on Discharge	RELEASE	Signature or initials of Official before whom the balance of Wages was paid and Release signed and date	Reference No.
9	10	11	12	13	14	15	16	17	18	19	We, the undersigned members of the crew of this Ship, do hereby release this Ship, and the Master and Owner or Owners thereof, from all Claims for Wages, or otherwise in respect of this Voyage, and I, the Master, do hereby release the said undersigned Members of the Crew from all Claims in respect of this said Voyage. Signatures of Crew (each to be on the line on which he signed in Col. 1) 20	21	
Master			£ s.	£ s.	£ s.	Blackwood							1
Mate		14/10/27	12 5 00			Blk							2
Cook		Do	12 5 00			Blk							3
Engineer		"	6 0 00			Blk							4
AB		"	6 0 00			Blk							5
AB		"	6 0 00			Blk							6
AB		"	6 0 00			Blk							7
													8
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country, even if a natural-born British subject or naturalised.
Electrical Engineers, or Wireless, and not merely as Engineers. Boys entirely employed in connection with the work of Cooks and Stewards should be described as Cabin Boys, not merely as boys
words "on conditional" should be inserted above the entry of the amount.
the Ship," then H.M.S. "Revenge"; and the other causes of leaving the ship should be briefly stated thus: "Discharged," "Deserted," "Left Sick", "Died."

[fol. 191] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

And thereafter, counsel for the said John T. Callahan, defendant, did tender this, his bill of exceptions, and did request the Judge of said court in which the said case was tried to authenticate and sign said bill of exceptions, according to the form of the statute in such case made and provided, which is done accordingly, at Wilmington, in said District, this eighth day of February, A. D. 1930.

(Sgd.) Hugh M. Morris, United States District Judge, District of Delaware.

IN UNITED STATES DISTRICT COURT

REASONS FOR NEW TRIAL—Filed January 18, 1930

The defendant in the above-stated case, by leave of the Court in that behalf, by Louis Halle and P. Warren Green, his attorneys, files the following reasons why the verdict of the jury should be set aside and a new trial granted:

First. That the verdict was against the evidence.

Second. That the verdict was against the law.

Third. That the defendant was found guilty by the jury with a recommendation of mercy under the first count after the United States of America, by its District Attorney, had made its election to stand upon the second count and had in effect by said election entered a nolle prosequi to the first count.

Fourth. That the instructions by the Court to the jury, especially as they related to aiding, abetting, inciting, [fol. 192] counselling and procuring, were all related to the first count which in effect had been nolle prossed by the United States of America, at the time it elected to stand upon the second count.

Fifth. That the verdict of the jury in finding the defendant guilty of aiding, abetting, inciting, counselling and procuring others to commit the alleged act of illegal im-

portation is to find that the said defendant had entered into an arrangement or agreement with Charles Newton and/or Albert Knickle, which in effect is a conspiracy and that said verdict cannot stand because the said defendant had been found not guilty on a charge of conspiracy involving the identical evidence on which said defendant was found guilty in the present case.

Sixth. That the Court erred in refusing to instruct the jury to bring in a verdict of not guilty as requested so to do by counsel for the accused.

That therefore it was a mistrial in the above-stated cause, and the said defendant by his attorneys, prays the Court that the verdict in this case may be set aside and a new trial granted.

(Sgd.) Lewis Halle, (Sgd.) P. Warren Green,
Attorneys for Defendant.

[fol. 193] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL—Entered January 18, 1930

Present: Leonard E. Wales, Esq., United States Attorney; Louis Halle, Esq., and P. Warren Green, Esq., attorneys for John T. Callahan, defendant.

Hearing on defendant's motion for a new trial and in arrest of judgment.

Arguments had and concluded.

Thereupon, it is ordered by the Court that said motion be and hereby is denied.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION AS TO SENTENCE—Entered January 18, 1930

Louis Halle, Esq., attorney for defendant, moves the Court that any sentence imposed by the Court in the above-entitled cause be imposed under Section 29 of the National

Prohibition Act and not under Section 593 (b) of the Tariff Act of 1922.

Arguments had and concluded.

Thereupon, it is ordered by the Court that the said motion be and hereby is denied.

To the entry of which order the said defendant, by Louis Hálle, Esq., his attorney, by leave of the Court, excepts.

[fol. 194] IN UNITED STATES DISTRICT COURT

SENTENCE—Entered January 18, 1930

And now, to-wit, this eighteenth day of January, A. D. 1930, John T. Callahan, alias Chic Callahan, alias —— Blake, one of the above-named defendants, being present at the bar of the court, the District Attorney moves for judgment;

And the said defendant being inquired of by the Court whether he has anything to say why the sentence of the law should not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said;

And it appearing to the Court that the said defendant, John T. Callahan, alias Chic Callahan, alias —— Blake, has been found "Guilty" in manner and form as he stands indicted under count one of the indictment returned against him in the above-entitled cause on the twelfth day of June, A. D. 1928, being No. 2 to the June Term, A. D. 1928 of said court, it is considered and adjudged by the Court now here that you, John T. Callahan, alias Chic Callahan, alias —— Blake, do forfeit and pay to the United States a fine of two thousand five hundred dollars ($2500); and further that you, John T. Callahan, alias Chic Callahan, alias —— Blake, be imprisoned in the United States Penitentiary, at Atlanta, Georgia, for the term of one year and one day, beginning on this eighteenth day of January, A. D. 1930, and ending on the eighteenth day of January, A. D. 1931.

And it is further considered, adjudged and ordered by the Court now here that you, John T. Callahan, alias Chic Callahan, alias —— Blake, be committed to the custody of the United States Marshal for the District of Delaware in order that the foregoing sentence may be carried into execution.

[fol. 195] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed January 18, 1930

The defendant, John T. Callahan, conceiving himself aggrieved by the judgment of conviction entered in the above-entitled cause, January 18, 1930, does hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Third Circuit, for the reasons specified in the assignment of errors filed herein, and he prays that his appeal may be allowed and citation issued directed to the United States of America, commanding it to appear before the United States Circuit Court of Appeals, for the Third Circuit, to do and receive what may appertain to justice to be done in the premises, and that the transcript of record, proceedings and papers upon which said judgment of conviction was entered be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pennsylvania.

John T. Callahan, by (Sgd.) P. Warren Green,
(Sgd.) Lewis Halle, His Attorneys.

Wilmington, Delaware, January 18, 1930.

IN UNITED STATES DISTRICT COURT

ORDER ALLLOWING APPEAL—Filed January 18, 1930.

And now, to wit, this eighteenth day of January, 1930, upon reading and considering the foregoing petition for appeal, it is, upon motion of Percy Warren Green and Louis Halle, attorneys for defendant,

[fol. 196] Ordered by the Court that the appeal of the said defendant, John T. Callahan, prayed for therein, be and hereby is allowed, and it is further

Ordered, that pending the hearing and determination of the said appeal and until the final determination thereof, the said defendant, John T. Callahan, herein, be released upon the giving of a bond in the sum of $15,000 in such form as may be provided by this Court, and that the said bond shall operate as a supersedeas.

(Sgd.) Hugh M. Morris, D. J.

In United States District Court

Assignments of Error—Filed January 18, 1930

And now, comes John T. Callahan, the defendant by Percy Warren Green and Louis Halle, his attorneys, and says that in the record, proceedings and judgment in the above-stated cause, there is manifest error in the following, to wit:

1. That the Court erred in denying the motion demurring to the indictment.

2. That the Court erred in denying the motion to dismiss the indictment.

3. That the Court erred in ruling that the acts set forth in the indictment constituted an offense under Section 593 (b) of the Tariff Act of 1922.

4. That the Court erred in refusing to direct the jury to acquit the defendant, for the reason that the evidence adduced by the United States of America did not constitute an offense as charged in the indictment.

[fol. 197] 5. That the Court erred in refusing to charge the jury in the words and manner following:

"That if the jury find that Callahan was not in St. Pierre at the time of the loading of the vessel, their verdict must be not guilty."

6. That the Court erred in refusing to direct a verdict of acquittal by reason of the fact that there was no testimony adduced at the trial showing that the defendant, John T. Callahan, committed any act or acts within the District of Delaware, and within the jurisdiction of this court, denounced by Section 593 (b) of the Tariff Act of 1922.

7. That the Court erred in refusing to direct a verdict of acquittal for the reason that there was no testimony adduced at the trial, showing that the defendant, John T. Callahan, committed any act within the District of Delaware, or within the jurisdiction of this court, denounced by Section 3, Title 2, of the National Prohibition Act.

8. That the Court erred in refusing to set aside the verdict of the jury, on the ground that the same was contrary

to law and against the weight of evidence, as it was not shown beyond a reasonable doubt that the defendant violated Section 593 (b) of the Tariff Act of 1922.

9. That the Court erred in refusing to set aside the verdict of the jury, on the ground that the same was contrary to law and against the weight of evidence, as it was not shown beyond a reasonable doubt that the defendant violated Section 3, Title 2, of the National Prohibition Act.

10. That the Court erred in imposing sentence under Section 593 (b) of the Tariff Act of 1922.

[fol. 198] 11. That the Court erred in imposing sentence on the defendant, John T. Callahan, in excess of the maximum penalty provided for in Section 29 of the National Prohibition Act of 1919, and in excess of the penalty provided for a violation of Section 3, Title 2, of the National Prohibition Act, as such penalty was provided for under the laws of the United States on the date when the offense as alleged in the indictment was committed.

(Sgd.) Percy Warren Green, (Sgd.) Lewis Halle,
Attorneys for Defendant, John T. Callahan.

Citation, in usual form, showing service on Leonard E. Wales, filed January 18, 1930, omitted in printing.

[fol. 199] In United States District Court

Præcipe for Transcript of Record—Filed February 10, 1930

Please prepare and certify a transcript of the record and proceedings in the above entitled cause for filing in the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pennsylvania, including therein the following, viz.:

1. Docket entries.
2. Indictment.
3. Motion to quash indictment.
4. Demurrer to indictment.
5. Opinion of court on demurrer.
6. Order overruling motion to quash and demurrer.
7. Defendant's plea.

8. Bill of exceptions.
9. Defendant's reasons for a new trial.
10. Order denying motion for new trial.

[fol. 200] 11. Defendant's motion as to sentence, order denying same and exception thereto.

12. Sentence.
13. Petition for appeal, order allowing appeal and assignments of error.
14. Citation.
15. Præcipe for transcript of record.
16. Clerk's certificate.

(Sgd.) Percy Warren Green, Attorney for Defendant-Appellant.

To H. C. Mahaffy, Jr., Esq., Clerk U. S. District Court, District of Delaware.

Service of the foregoing præcipe, with copy, accepted this tenth day of February, A. D. 1930.

(Sgd.) Leonard E. Wales, United States Attorney, District of Delaware.

[fol. 201] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 202] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, March Term, 1930.

No. 4351 (List No. 96)

JOHN T. CALLAHAN, Appellant,

vs.

UNITED STATES, Appellee

ORDER ASSIGNING JUDGES—Filed May 9, 1930

Appeal from the District Court of the United States for the District of Delaware

And now, to-wit, this ninth day of May, A. D. 1930, it is ordered that Hon. William Clark, District Judge for the

District of New Jersey, and Hon. John Boyd Avis, District Judge for the District of ——, be, and they are hereby, assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 203] Minute entry of argument and submission, May 9, 1930, omitted in printing.

[fol. 204] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1930

No. 4351

JOHN T. CALLAHAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

Before Davis, Circuit Judge, and Clark and Avis, District Judges

OPINION—Filed October 29, 1931

AVIS, District Judge:

Appellant, defendant in the court below, appeals from his conviction and sentence, under an indictment charging him with importation of intoxicating liquor contrary to the provisions of section 593 (b) of the Tariff Act of 1922. The relevant part of this statute reads as follows:

"If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, * * * such merchandise shall be forfeited and the offender shall be fined in any [fol. 205] sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both. * * *"

19 U. S. C. A., sec. 497.

The indictment returned by the Grand Jury in the District of Delaware charged Charles Newton, alias Charles R.

Brown and Albert Knickle with a violation of this statute in two counts. The first count charged that these two defendants on November 10, 1927 "did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware * * * certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit, * * * —all of said liquors containing more than one-half of one percentum of alcohol by volume and being fit for use for beverage purposes * * *"

This count charged that such importation was in violation of the statute aforesaid, because (1) imported without permit; (2) without payment of customs duties, and (3) in violation of section 3, Title II, of the National Prohibition Act.

As a separate paragraph of this count the grand jury indicted the defendant-appellant on the charge that he did aid, abet, incite, counsel and procure the aforesaid defendants to commit, and in committing, the aforesaid unlawful act.

The second count charged all three of the defendants with the commission of the offense based upon the unlawful importation of the liquors, contrary to the provisions of the section of the Tariff Act hereinbefore referred to, and for the same three alleged violations.

[fol. 206] Before trial the second count was nolle prossed on the motion of the United States Attorney, and we are, therefore, concerned only with the action of the court on the first count.

Counsel for the defendant-appellant moved, in the court below, to dismiss or quash the indictment on the ground of autrefois acquit; that the defendant-appellant at the December Term 1927 of said court, upon a previous trial, and upon another indictment, was acquitted of the charges stated in the indictment in question. This motion was dismissed and overruled by the trial court, and as it has not been raised, orally or in briefs, we presume this point has been abandoned.

Subsequently, on May 13, 1929, defendant-appellant filed a demurrer to the indictment, alleging sundry defects therein, and upon such demurrer the trial court held that

that portion of the indictment alleging (1) importation without permit and (2) without payment of customs duties, did not charge an offense under the law, but sustained count one of the indictment insofar as it charged against the defendant-appellant the offense, under the Tariff Act, of aiding and abetting the importation of intoxicating liquor "contrary to law", in violation of the provisions of section 3, Title II, of the National Prohibition Act. Subject to our conclusion as to the repeal of the provisions of the Tariff Act, hereinafter referred to, we approve of this action of the trial court, holding that the words "contrary to law" in the Tariff Act means contrary to any existing law, and so if the liquor in question was imported contrary to the provisions of section 3, Title II, of the National Prohibition Act, it violated the Tariff Act under which the defendant was indicted.

It is claimed that the defendant-appellant was not in the District of Delaware at the time the offense was committed, and that, by reason of his being out of the District, he could not be found guilty of the offense charged. The [fol. 207] law is quite clear that a person may be convicted of aiding, abetting and inciting the commission of an offense, even though he may not be in the district when the offense is actually committed, if the court has jurisdiction of the defendant at the time of trial.

This principle is recognized by Congress in section 42 of the Judicial Code (28 U. S. C. A. sec. 103), as it refers to jurisdiction between the various district courts, and is upheld and applied in the Supreme Court case of Ford v. United States, 273 U. S. 593, 620.

Intoxicating liquor has been held to be merchandise within the designation of the tariff laws. Bookbinder v. United States (C. C. A.) 287 F. 790.

An importation takes place whenever merchandise is brought within the territorial waters of the United States with intent to illegally bring said merchandise into the country. Gillespie v. United States (C. C. A. 2) 13 F. (2d) 736.

The main controversy in this case, as we see it, is confined to two important questions:

(1) Did the indictment charge an offense under the Tariff Act?

(2) Was the evidence produced sufficient to justify the court in submitting to the jury the guilt of innocence of the defendant-appellant?

Counsel claims that if the defendant-appellant was guilty of any offense, it was a violation of the National Prohibition Act; that when Congress enacted section 3, Title II, of this Act, it provided the only method by which a person could be convicted of the crime of illegal importation of intoxicating liquor, and that its provisions precluded the Government from prosecuting under any other law for such offense. In other words, it is claimed that the section [fol. 208] of the National Prohibition Act, referred to, by implication repeals the section of the Tariff Act under which this indictment was returned, and that prosecutions for importation of intoxicating liquor may be instituted only under the terms of the Prohibition Act.

There may have been some questions on this point prior to the enactment of the, so-called, Willis-Campbell Act (27 U. S. C. A., sec. 3).

The case of Bookbinder v. United States (C. C. A. 3) 287 F. 790, supra, upon which plaintiff-in-error materially relies, was decided prior to the passage of the Willis-Campbell Act, and while, in the opinion in that case, Judge Woolley suggested that the Prohibition Act may have repealed the provision of the Tariff Act, as it affected actual importation, the case was decided upon other provisions of the Tariff Act, which were not affected by the unlawful importation provisions of the Prohibition Act.

However, since the passage of the Willis-Campbell Act, the Supreme Court has reviewed this whole matter, and has settled the law applying to this particular question in the case of United States v. Stafoff, 260 U. S. 477. The court in that case said:

"In United States v. Yuginovich, 256 U. S. 450, it was decided that sections 3281 and 3282 were repealed by the later law, at least as to the production of liquor for beverage purposes. Since that decision and with reference to it, as appears from the House Report, No. 224, 67th Cong., 1st sess., and the debates, 61 Cong. Rec., Part 3, pp. 3095, 3096, the Act Supplemental to the National Prohibition Act was passed. Act of November 23, 1921, c. 134, sec. 5, 42 Stat. 222, 223. By section 5 of this statute

'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws, that were in force when the National Prohibition Act was enacted, shall be and continue in [fol. 209] force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act.' (But if an act violates both the former and the latter a conviction under one is a bar to prosecution under the other)." (p. 479).

"But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. Swigart v. Baker, 229 U. S. 187, 198. Of course Congress may tax what it also forbids. 256 U. S. 462. For offenses committed after the new law, United States v. Yuginovich can not be relied upon" (p. 480).

This decision has been approved in other Supreme Court cases, and followed in many cases in the circuit and district courts, and disposes of the contention in the instant case based upon the claimed repeal of the section of the Tariff Act in question.

We think the testimony produced justified the court in submitting the facts to the jury; that the refusal to charge as requested was right; and that the trial court committed no error in denying the motion in arrest of judgment and refusing a new trial.

The judgment is affirmed.

A true copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 210] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1930

No. 4351 (List No. 96)

JOHN T. CALLAHAN, Appellant,

vs.

UNITED STATES, Appellee

JUDGMENT—Filed Oct. 29, 1931

On Appeal from the District Court of the United States for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, October 29, 1931.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fols. 211-222] Petition for rehearing covering 12 pages, filed November 11, 1931, omitted from this print. It was denied and nothing more by order of November 27, 1931.

[fol. 223] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—Filed Nov. 27, 1931

And now, to wit, November 27, 1931, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —— —, ——.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 224] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 225] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument on Monday, February 29, 1932, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsement on cover: File No. 36,390. U. S. Court of Appeals, Third Circuit. Term No. 576. John T. Callahan, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed December 16, 1931. File No. 36,390.

FILE COPY

No. 576

Office Supreme
DEC
CHARLES

Supreme Court of the United States

———— TERM, 1931.

JOHN T. CALLAHAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

LOUIS HALLE,
Attorney for Petitioner.

CORPORATE PRESS, INC., New York City

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Supreme Court of the United States

.....TERM, 1931.

JOHN T. CALLAHAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

1. That he was indicted in the United States District Court for the District of Delaware during the June term, 1928, and convicted on the 14th day of January, 1930. Thereafter, during the March term, 1930, an appeal was heard and after due deliberation, a decision and opinion filed October 29th, 1931.

That said indictment was in two counts. The second count may be disregarded as the United States Attorney elected to proceed solely on the first count, and withdrew the second (R., p. 164).

The first count as originally drawn is set forth at page five of the record. It is to be noted that this count purports to allege a violation of the provisions of section 593(b) of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922.

The petitioner was convicted on said count and sentenced to forfeit and pay to the United States a fine of $2,500 and be imprisoned in the United States Penitentiary at Atlanta for a term of one year and one day.

Although the indictment names three defendants, a severance was had as to all others and the trial proceeded as against your petitioner.

Count one of the indictment alleges a violation in that:

> "* * * the said defendants, Charles Newton, alias Charles R. Brown and Albert Knickle, both late of the District of Delaware, and within the jurisdiction of this Court, did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware, near the town of Lewes, Sussex County, and State of Delaware, certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit, Scotch malt, whiskey, gin, peach and apricot brandy, creme de menthe, kummel, sparkling burgundy and other alcoholic liquors, the exact kinds and amounts of which are to the grand jurors unknown—all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922—in that the said defendants did import and bring and assist in importing and bringing into the United States, to wit, within the territorial waters of the District of Delaware, from St. Pierre-Miquelon as aforesaid, the said merchandise, without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the said Tariff Act of 1922, and in that said merchandise was then and there by the said defendants imported and brought into the United States without payment of

the customs duties thereon as required by Schedule 8 of said Tariff Act of 1922, and in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3 of Title 2 of the National Prohibition Act, the said defendants then and there well knowing that said merchandise was so imported and brought into the United States contrary to law as aforesaid."

The Court after hearing argument on the motion demurring to the indictment rendered an opinion (R., p. 11), sustaining the demurrer to so much of the indictment which charged:

(a) the importation of the merchandise without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the said Tariff Act of 1922.

(b) That the said merchandise was then and there by the said defendants imported and brought into the United States without payment of the customs duties thereon as required by Schedule 8 of the said Tariff Act of 1922.

The case proceeded to trial on the indictment with (a) and (b) stricken out, and your petitioner found guilty on that count in the indictment which charged that the defendants Charles Newton alias Charles R. Brown and Albert Nichol did unlawfully, wilfully, knowingly and fraudulently import and bring into the United States and assist in importing and bringing into the United States from St. Pierre, Miquelon, into the territorial waters of the District of Delaware * * * in violation of Section 3, Title II of the National Prohibition Act.

Your petitioner contends that the learned Circuit Court of Appeals erred in refusing to grant the motion to dismiss the indictment on the ground that the same does not spell out an offense under section 593(b) of the Tariff Act of 1922. The Court below in overruling the demurrer to the

latter part of the indictment construed it to mean that the violation of law as charged in the indictment consisted of the violation of the National Prohibition Act. The Court so stated in its opinion (R., p. 12).

The importation of intoxicating liquors contrary to the National Prohibition Act, Section 3, Title II thereof is an offense created entirely by that statute. Section 593(b) of the Tariff Act of 1922 did not supersede the National Prohibition Act regarding importation, as Section 593(b), though later in time, is not inconsistent therewith. Section 593(b) of the Tariff Act of 1922 does not prohibit the importation of intoxicating liquors as does the National Prohibition Act, in fact, under Section 593(b) and under the Tariff Act of 1922, intoxicating liquor may be imported if done so in accordance with Schedule 8. There is no general prohibition against the importation of intoxicating liquors in the Tariff Act. Consequently the Tariff Act of 1922, and any part thereof cannot be deemed to be inconsistent with the National Prohibition Act regarding the importation of intoxicating liquors, and to hold that it superseded the National Prohibition Act is error.

Wherefore, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, the above cause, and a complete transcript of the record and all proceedings therein, that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

John T. Callahan

Petitioner,
By LOUIS HALLE,
Counsel.

Dated, New York, December 12, 1931.

United States of America,
Southern District of New York, } ss.:
County of New York,

JOHN T. CALLAHAN, being duly sworn, says: I am the petitioner herein; I have read the said petition and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

John T. Callahan

Subscribed and sworn to before me
this 17 day of December, 1931.

Gustave Halle

GUSTAVE HALLE
Notary Public, Kings Co. 114 Reg. No. 2115
Cert. filed in N.Y. Co. 264, Reg. No. 2R155
Commission Expires March 30, 1932

I hereby certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well founded and should be granted by this Honorable Court.

Louis Halle

SUPREME COURT OF THE UNITED STATES.

JOHN T. CALLAHAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case and Facts.

The pertinent facts in connection with this application have been stated in the petition and will not be repeated except when necessary comment is made upon them in the course of the argument.

Questions Argued.

The questions that will be argued have already been presented in the petition and will be discussed on the following points:

POINT I.

The Court erred in refusing to dismiss the indictment on the ground that the same does not spell out an offense under Section 593(b) of the Tariff Act of 1922.

POINT II.

The sentence of the Trial Court was erroneous and void by reason of Section 29 of the National Prohibition Act, which governs.

POINT I.

The Court erred in refusing to dismiss the indictment on the ground that the same does not spell out an offense under Section 593(b) of the Tariff Act of 1922.

The importation of intoxicating liquors contrary to the National Prohibition Act, Section 3, Title II thereof, is an offense created entirely by that statute. Section 593(b) of the Tariff Act of 1922 did not supersede the National Prohibition Act regarding importation, and though later in time, is not inconsistent therewith. Section 593(b) does not prohibit the importation of intoxicating liquors as does the National Prohibition Act, in fact, under Section 593(b) of the Tariff Act of 1922, intoxicating liquor may be imported if done so in accordance with Schedule 8. Consequently the Tariff Act of 1922 and any part thereof cannot be deemed to be inconsistent with the National Prohibition Act regarding the importation of intoxicating liquors, and to hold that it superseded the National Prohibition Act was error.

The Court in rendering its opinion relies in the main on the case of

Bookbinder v. *United States* (C. C. A. 3) 287 Fed. 790.

The Court holds a correct interpretation of this case to be that since it was decided prior to the passage of the Willis-Campbell Act, and while in the opinion in that case Judge WOOLLEY suggested that the Prohibition Act may have repealed the provisions of the Tariff Act as it affected actual importation, the case was decided upon other provisions of the Tariff Act which were not affected by the unlawful importation provisions of the Prohibition Act.

The Willis-Campbell Act was passed November 23rd, 1921. The *Bookbinder* case, *supra,* was decided March 13, 1923, two years later. The indictment in the *Bookbinder* case, however, was returned in September, 1921, but the opinion, nevertheless, discusses the force and effect of both the Willis-Campbell Act and the case of

United States v. *Stafoff,* 260 U. S. 477,

on the subject matter at hand.

But of paramount importance is the statement in the *Bookbinder* case, *supra,* found at page 794:

> "And the same difference maintains between the case of *United States* v. *McKenzie* (D. C.) 283 Fed. 667, and the case at bar. There the Court held that the identical section (R. S. Sec. 3082) was repealed by the National Prohibition Act. In that case the charges of the indictment were the importation, transportation, and the smuggling of liquors, all of which offenses the National Prohibition Act, the later statute, specifically denounces and for which it provides specific penalties. The *McKenzie* case differs from the case at bar in that it dealt with importation of liquor while the case at bar has to do with receiving and concealing liquor unlawfully imported. About this the National Prohibition Act says nothing."

It would seem that the reasoning of the Circuit Court of Appeals in this Circuit in the *Bookbinder* case is controlling notwithstanding the passage of the Willis-Campbell Act or the decision of the United States Supreme Court in the *Stafoff* case. The fact that the merchandise involved is intoxicating liquor, the importation of which was prohibited by the National Prohibition Act, created an offense which did not exist under the old laws, and therefore the supplemental act did not change the complexion of Section 593(b) of the Tariff Act of 1922. The language

of the Willis-Campbell Act, and as this Court has observed in its opinion wherein it cites the holding of the United States Supreme Court in the *Stafoff* case, shows beyond doubt that the supplemental act refers only to

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force when the National Prohibition Act was enacted shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act."

It follows that such enactment cannot be invoked in the present case for the law involved herein is *Section 593(b) of the Tariff Act of 1922 which is not a law regarding "the manufacture and taxation of and traffic in intoxicating liquor."*

It is contended that the learned Circuit Court of Appeals has mistaken the force and effect of the decision of the United States Supreme Court in the *Stafoff* case, and has broadened the holding of that case beyond the scope of its decision and dicta. The *Bookbinder* case, *supra,* is still the law of this Circuit and is not in conflict with any other circuit's decision.

It is respectfully submitted that the Court erred in its construction of the case of

> *Gillespie* v. *United States* (C. C. A. 2), 13 Fed. (2d) 736,

regarding which the Court at page 4 of its opinion states as follows:

> "An importation takes place whenever merchandise is brought within the territorial waters of the United States with intent to illegally bring said merchandise into the country."

The Court in the case, *Gillespie* v. *U. S.*, *supra*, at page 737, states:

> "Plaintiffs-in-error, however, are not accused of 'running' this liquor, or of any offense under the National Prohibition Law; nor does that statute have any connection with their crime; except to render the bringing into the United States of the whiskey in the manner above described unlawful, for reasons not necessarily having a connection with revenue."

Further on the Court goes on to say:

> "The statute relied upon, and above quoted, does not speak of smuggling; the statutory words in section 593(b) are to *'bring into* the United States.' It is in section 593 (a) that punishment is prescribed for one who 'smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced,' etc."

And at page 738 of the case the Court expressly shows the circumstances under which Section 593(b) may be invoked for an unlawful importation of intoxicating liquors by definitely and conclusively stating as follows:

> "In fact, all the whisky still on the tug, while it was not yet smuggled, was in the United States and unlawfully brought there, because, as charged in the indictment, it was brought in without a permit."

This case is distinguishable from ours on the common ground with the case of

> *Keck* v. *United States*, 172 U. S. 434, 43 L. Ed. 505,

which reversed the lower Court and dismissed an indictment for the identical absence of an allegation of the

alleged illegality of the importation. A similar situation presents itself in our case where there is an absence of a statement in the indictment that the liquor was aboard the vessel within the territorial waters of the United States without a permit.

Yet the *Gillespie* case wherein the Court holds as *supra* cited that the goods would be brought into the United States contrary to law, does not hold that that would be contrary to Section 593(b) and it is conceded, and we argue and contend for the fact that it would be contrary to law but contrary only to the National Prohibition Act which condemns such importation. That this construction of the *Gillespie* case is a true one is apparent in the Court's statement relied on at page 738 where it states:

> "The first count in the *Keck* case was based on R. S. Sec. 3082 (Comp. St. Sec. 5785), substantially identical with section 593(b) of the Tariff Act of 1922. That count was held insufficient—and there was no dissent on this point—because of the failure to specify in the indictment in what way the importation was contrary to law. In the indictment before us it is specifically charged in the allegation that the importation was without the required permit."

Furthermore, in the *Gillespie* case the charge against the defendants was facilitating the transportation, concealment, etc., of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. This is not an offense under the National Prohibition Act. The Court does not pass upon the point involved in our case, and so much of the ruling as is dicta, is unquestionably in support of our contention. The real gist of the holding of the *Gillespie* case may be found at page 738:

> "However inartistic the indictment in this case may be, it is clear that it was intended to charge

> the offense created by section 593(b), and not that created by section 593(a). These defendants are not charged with having smuggled the goods, or with being accessories to the smuggling; they are charged with having facilitated the transportation of the goods after they had been smuggled, and with knowledge that they had been brought into the country contrary to law."

In that respect the indictment was treated identically as it was in the *Bookbinder* case, *supra.*

The National Prohibition Act does not denounce concealment or facilitation in transportation after illegal importation of intoxicating liquor.

The case of

McGill v. *United States*, 28 Fed, (2d) 572

seems determinative. The same considerations of the indictment and the proof govern here as in the *McGill* case, *supra,* and in

Keck v. *United States, supra.*

Can it with reason be held that if there were a permit to import the liquor in question that the facts nevertheless would substantiate a violation of Section 593(b) of the Tariff Act of 1922 in the absence of a showing that opportunity had been afforded for the payment of duties and that a customs barrier had been passed without such payment? In short, importation under the Tariff Act is not synonymous with or identical to importation under the National Prohibition Act. Under the former, merchandise at a definite point and within a definite time must be properly declared, and upon failure to comply, upon the passing of a customs barrier, the act of importation is complete. Under the latter, a mere carriage of intoxicating liquors for beverage purposes into the territorial waters of the

United States without a permit incurs liability under Section 3, Title II of the National Prohibition Act. No more has been shown than the coming into the territorial waters of the United States of a vessel upon which there was a cargo of intoxicating liquor. The demurror to the indictment was sustained insofar as the indictment referred to any acts other than the act of coming within the territorial waters with a cargo of intoxicating liquors.

The indictment having been stripped by the District Court's decision sustaining so much of the demurrer as refers to (1) the importation as contrary to law in that it was made without a permit from the Commissioner of Internal Revenue, (2) without payment of the customs duties thereon as required by Schedule 8 of the Tariff Act of 1922, leaves nothing except the allegation that the importation was in violation of Section 3, Title II of the National Prohibition Act. There is no general prohibition against the importation of intoxicating liquors in the Tariff Act. In fact, intoxicating liquors may be imported. In all the authorities cited both in the original brief of the appellant and in that of the government, whenever Section 593(b) of the Tariff Act of 1922 was invoked, there was present in the indictment and in the proof, facts showing the character of the violation directly contrary to some specific provision of the Tariff Act. *In that respect the case at bar is distinguishable from all those authorities, regardless of how they may be construed, for in none of them was there simply and solely an alleged illegal importation by virtue of the violation only of Section 3, Title II of the National Prohibition Act.*

It is respectfully urged that Congress intended that a fine be imposed of $500 as a maximum for the importation of intoxicating liquors on the dates specified in the indictment, that under the circumstances of this case and under the indictment as reduced by the Court's ruling on the de-

murrer, that the violation of law, if any, was a prohibition violation and that Congress has imposed the penalty in Section 29 of the National Prohibition Act. To invoke under circumstances such as these, in the face of an indictment such as this, Section 593(b) of the Tariff Act of 1922 is to subvert the direct command of Congress as expressed in Section 3, Title II of the National Prohibition Act and to invoke a more severe penalty by reason of the artifice of a pleader who has invoked a tariff regulation which Congress had no intent of using in a fact situation as presented here.

In the case of

United States v. *Dowling,* 278 Fed. 630,

the Court at page 641 discusses the effect of the passage of the Volstead Act on the existing statute, Section 3082 of the Revised Statutes which is substantially identical to Section 593(b) of the Tariff Act of 1922. The Court at page 641, states:

> "The fifth and sixth grounds of demurrer to count No. 4 of indictment 1424 show an additional reason why it is insufficient. These grounds are:
>
> "'(5) Section 3082 of the Revised Statutes of the United States, as applied to intoxicating liquors for beverage purposes, has been repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.
>
> "'(6) Section 3082, of the Revised Statutes of the United States, as applied to intoxicating liquor for beverage purposes, has been superseded by the National Prohibition Act.'
>
> "Considering these grounds of demurrer, I think the passage of the Volstead Act impliedly repealed section 3082 of the Revised Statutes. It is noted that the Volstead Act is a later act than sec. 3082 and that the Volstead Act imposes penalties of less severity than those imposed by section 3082. In the case of *U. S.* v. *Yuginovich,* 256 U. S. 450, 41

Sup. Ct. 551, 66 L. Ed. ...., the holding was as follows:

"'Existing penal statutes are repealed by later ones covering practically the same acts, but fixing lesser penalties.'

"Also see *U. S.* v. *Windham* (D. C.) 264 Fed. 376.

"Section 3082 is the smuggling statute, and it imposes a penalty of $5,000 and two years' imprisonment upon any one found guilty of knowingly assisting in smuggling. Section 3 of the Volstead Act prohibits importation of intoxicating liquors, and section 29 provides that, for violations where a special penalty is not provided, the punishment shall be a fine of not more than $500. So the ground is fully covered by the Volstead Act, as it is a later statute, and as the penalty prescribed by it is less than that prescribed by section 3082, R. S. section 3082 would also appear to come within the provisions of section 35 of the Volstead Act, which provides for the repeal of conflicting acts to the extent of the conflict."

It is evident from this opinion that the Court has intepreted the intent of Congress in passing the Volstead Act to be that such enactment was to make the act all-dominant and controlling so far as relates to the importation of intoxicating liquors. It appears illogical to assume that the Volstead Act which particularly relates to intoxicating liquors shall have been superseded by the Tariff Act of 1922 which is all-embrasive in its intendment.

We respectfully contend that the words "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 means contrary to some law which itself does not prescribe a penalty. It has no reference to any law which if violated prescribes the punishment therefor. This is particularly true where Congress as here, created the offense in Section 3, Title II of the National Prohibition Act and has imposed

the punishment for the violation. Furthermore, "contrary to law," as used in this said section and as held by this Court in this opinion refer to Section 3, Title II of the National Prohibition Act as being the law contrary to which the alleged importation was committed.

There is no showing in the indictment that the liquor in question was imported for beverage purposes, Section 3, Title II of the National Prohibition Act not prohibiting by its terms the importation of liquor for non-beverage purposes.

It is elementary that the facts of an indictment govern; that the pleader's nomination of a particular statute does not render the indictment invalid if such statute does not cover the fact situation. The Court nevertheless will proceed to sentence if a conviction is obtained under the applicable statute.

The indictment herein names Section 593(b) on a fact situation (after demurrer) which can only refer to the National Prohibition Act. Of course, the statement in the indictment "the said defendants then and there well knowing that such merchandise was so imported and brought into the United States as aforesaid," which immediately succeeds the statement, "in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3, of Title II of the National Prohibition Act," means exactly what it states, and that is to say, that the importation was in violation of the National Prohibition Act. The interpretation and construction of "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 may be correct, and yet this indictment in its language does not support such construction.

Section 593(b) of the Tariff Act does not fix a special penalty for the importation of intoxicating liquor. It does not deal specifically with intoxicating liquor, in fact, im-

portation of intoxicating liquor is not prohibited under the Tariff Act of 1922. It is only the importation of merchandise in general to which the Tariff Act of 1922, Section 593(b) thereof, relates. On the other hand, the National Prohibition Act specifically prohibits not the importation in general of merchandise but specifically of intoxicating liquor. It prescribes and fixes a penalty therefor. The penalty, like many others for violations of the terms of the National Prohibition Act, is found in Section 29 thereof. Indeed, if there were no penalty imposed under the National Prohibition Act for the importation of intoxicating liquors, the importation thereof would be no offense, for there can be no offense without a penalty.

United States v. *Seibert*, 2 Fed. (2d) 80.

If the National Prohibition Act was superseded with regard to importation of intoxicating liquors by Section 593(b), then there is no additional force and effect of the Jones Act which raises the punishment for the illegal importation of intoxicating liquors to five years' imprisonment and a fine of $10,000 and directs that the change be effective in regard to the National Prohibition Act without in any manner referring to Section 593(b) of the Tariff Act of 1922. The only extent to which Section 593(b) can be held to have superseded the National Prohibition Act is in reference to offenses which Section 593(b) specifically create and which are not to be found in the National Prohibition Act—otherwise, both statutes would be inconsistent.

POINT II.

The sentence of this Court was erroneous and void by reason of Section 29 of the National Prohibition Act which governs.

(a) The contention here made is that, assuming without conceding, that the indictment in the case at bar has in it all the ingredients essential to constitute the offense of importation denounced by the National Prohibition Act, that the sentence of the Court imposing a fine and imprisonment of one year and a day against the defendant was void, at least in so far as it exceeds the penalty imposed under the terms of the National Prohibition Act, Section 29. It has already been pointed out that Section 593(b) is a general statute which imposes a penalty for the importation of merchandise in general contrary to law. It is urged that contrary to law as used in Section 593(b) means contrary to such laws which do not provide for the imposition of a penalty for their infraction. Section 593(b) of the Tariff Act of 1922 is a general statute fixing a punishment therein for the violation of laws or enactments governing and controlling the manner in which merchandise in general may be brought into the United States. The failure to have a permit, the failure to pay duties as prescribed, and the failure to properly mark packages and stamp them, all of which are prescribed by law, and for none of which a penalty for the violation of which is prescribed: these are the laws which Section 593(b) may be invoked to impose its sanction upon, but for the violation of a statute which creates an offense and imposes a penalty—for such offenses it is contended that Section 593(b) may not be invoked unless it can be construed to be a repealer of such other statute or unless the intent of Congress can be gleaned from the two statutes

under consideration and the later statute interpreted as superseding the former one.

The National Prohibition Act denounces an illegal importation of intoxicating liquors. It prescribes the penalty therefor under Section 29 thereof.

In the case of

Baily v. *Allen E. Walker*, 2 Fed. (2d) 123 at page 124

we find this canon of statutory construction which applies to the case at bar:

> "It is elementary in the interpretation of statutes that specific provisions relating to a given subject shall prevail over more general ones relating to a class of which the particular subject is but a part, unless the context or some other proper basis of construction clearly shows a different legislative purpose."

See also:

United States v. *Zenith Radio Corp.*, 12 Fed. (2d) 614.

In the case of

Simon v. *Simon*, 26 Fed. (2d) 530,

at page 532, the Court holds:

> "It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as an exception to the general statute. *Ex parte Crow Dog*, 109 U. S. 556, 570, 3 S. Ct. 396, 27 L. Ed. 1030; *Rodgers* v. *United States*, 185 U. S. 83, 87, 88, 89, 22 S. Ct. 582, 46 L. Ed. 816."

That Congress clearly intended that Section 3 of Title 2 of the National Prohibition Act be applied to the illegal importation of intoxicating liquors becomes an unassailable fact when viewed in the light of the language of the Jones Law. By that enactment which in point of time was seven years later than the Tariff Act of 1922, we find Congress effected a change in the sanction under Section 29 with respect to, among other things, a prosecution for the importation of intoxicating liquor. By this enactment the penalty imposed for the offense of importation under the National Prohibition Act was increased to a fine not to exceed $10,000 or imprisonment not to exceed five years or both. To say that Congress intended the Tariff Act of 1922, Section 593(b) thereof to be used in a prosecution for an illegal importation of intoxicating liquor is to refuse to recognize the expression of the intent of Congress as exhibited in the Jones Act *supra*. Congress never intended the Tariff Act of 1922 to impose a sentence or a penalty for the illegal importation of intoxicating liquors in violation of the National Prohibition Act. As late as 1929 Congress, in enacting the Jones Law, was satisfied that the National Prohibition Act imposed a penalty for importation of intoxicating liquors. To hold, as the Trial Court did in this case, that Section 593(b) of the Tariff Act of 1922 superseded Section 29 on the ground that a specific penalty for the illegal importation is provided for in Section 593(b) is in effect a holding that importation of intoxicating liquors under the National Prohibition Act is no offense.

See

United States v. *Seibert, supra.*

Furthermore, under the Tariff Act of 1922, Paragraph 801, Schedule 8, which provides for the import duties on spirits, wines and other beverages reads as follows:

> "Nothing in this Schedule shall be construed as in any manner limiting or restricting the provisions of Title 27 (The National Prohibition Act as amended)."

This is an unequivocal expression of the intent of Congress that the Tariff Act of 1922 should affect its own field of legislation and in no manner trespass upon the terms of the National Prohibition Act.

Unless a punishment is provided, a statute does not create a crime. Furthermore, the Jones Act would be utterly ineffective with respect to importation of intoxicating liquor if the Court here is correct. Anyone commercializing on a large scale the importation of intoxicating liquors who would be indicted under the Jones Act for such importation could argue on the basis of the Court's decision in this case, that with respect to the importation of intoxicating liquors, the Tariff Act of 1922, Section 593(b) superseded importation under the National Prohibition Act and the penalty therefor. It would also follow that the Jones Act was a nullity so far as importation is concerned by reason of the fact that it effects a change in a statute, already superseded. In this connection another well-established canon of statutory construction effectively comes into play. We find it well stated in the case of

> *Washington Railway, etc.* v. *District of Columbia,* 10 Fed. (2d) 999, at page 1001:

> "It is a well established rule that repeals by implication are not favored, and that a general statute without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent."

At this point counsel reverts to Point I of this brief in which the respective roles to be played by Section 3, Title 2 of the National Prohibition Act, and Section 593(b) have been pointed out. The latter statute may be invoked as an aid to the enforcement of the National Prohibition Act, when coupled with the illegal importation, there is the receipt and concealment thereof after importation. Of course, Section 593(b) may be invoked for the illegal importation of intoxicating liquor, providing its illegality is shown to be in violation of the Tariff Act of 1922, in which case 593(b) may be deemed to be co-extensive in its application with Section 3, Title 2 of the National Prohibition Act. But we are not concerned with this phase of the acts under consideration for the reason that the indictment failed to incorporate in it any illegality embraced by the terms of the Tariff Act of 1922 after the demurrer to it had been interposed.

The statement in the indictment that the acts complained of were contrary to Section 593(b) of the Tariff Act of 1922 is a conclusion of the pleader and may be disregarded, and if the facts in the indictment are sufficient to state a cause of action and sufficiently inform the accused of the nature of the charge against him, such an indictment will be sustained under the proper statute applicable thereto.

Harper v. *U. S.*, 27 Fed. (2d) 77 at page 79:

> "The fact that the pleader has misstated the number of the section is immaterial, it being sufficient if the language fully states an offense denounced by the federal statutes. *Johnson* v. *Biddle* (C. C. A.) 12 F. (2d) 366 at 369; *Taylor* v. *U. S.* (C. C. A.) 2 F. (2d) 444. In the latter case it is held that reference by number to the wrong section of the Criminal Code as the one under which the

> indictment is brought does not affect or defeat the indictment. An indictment is nothing more than a pleading, and its sufficiency must be determined by the facts therein set forth. The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion which may or may not be correct, and neither adds nor detracts from the allegations."

While we seriously question the validity of the indictment even under the National Prohibition Act by reason of the failure to include the essential ingredient that the liquor was imported for beverage purposes, nevertheless, if the indictment can be justified at all, it can only be under the terms of the National Prohibition Act. The sentence therefore, upon conviction of the defendant should have been imposed under and in accordance with the terms of Section 29 of the National Prohibition Act. In imposing a sentence of imprisonment when the said section imposes a maximum a fine of $500, the Trial Court imposed a void sentence as it was without jurisdiction in doing so.

To raise an offense from the degree of a misdemeanor to that of a felony, Congress must specifically by statute state its intention so to do.

Under the National Prohibition Act, importation of intoxicating liquor prior to the Jones Act *supra*, was a misdemeanor, the punishment therefor being at maximum the fine of $500. Section 29 *supra* Section 541, Title 18, U. S. C. A., Cr. Code Sec. 335. If Section 593(b) may be invoked, a sentence of two years or a fine of $10,000 or both may be incurred. The violation of this statute, therefore, constitutes a felony. Nothing in Section 593(b) indicates any intention on the part of Congress to raise the crime of importing intoxicating liquors to the degree of a felony. It was a misdemeanor up until specific legis-

lation changing it into a felony was enacted by the Jones Act, *supra*.

See:

Ross v. *U. S.*, 37 Fed. (2d) 557.

(b) A conviction under an indictment based on a violation of the Prohibition Act and a sentence under Section 593(b) of the Tariff Act are inconsistent.

The Court, in holding that Section 593(b) superseded so far as the penalty is concerned, Section 29 of the National Prohibition Act regarding importation of liquor, was in error. For the purpose of this point, counsel will assume that Section 593(b) did effect a change in the law with regard to the importation of intoxicating liquors. Thus it will not be contended here that Section 593(b) found as it is in a separate body of law, wholly apart from and independent of the National Prohibition Act cannot, in the absence of a specific reference to the later statute, effect a change, even though it was enacted subsequent in time, and it will not at this time be contended that the raising of the sanction and the status of the offense from a misdemeanor to a felony or an infamous crime, cannot be accomplished without an unequivocal expressed intent found in the language of the enactment itself. But it will be entirely assumed, without conceding, that the Court was correct in its holding that penalties imposed under 593(b) superseded Section 29, and counsel wishes to point out to this Court the inevitable consequences that flow from such a holding in the light of the authorities on the subject.

The leading authority is the case of

United States v. *James Tynen*, 20 L. Ed. 153, 11 Wall. 88-95.

The pertinent language is as follows:

"There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is given effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairbairn,* 3 How. 636; *Bartlett* v. *King,* 12 Mass. 537; *Com.* v. *Cooley,* 10 Pick. 37; *Pierpont* v. *Crouch,* 10 Cal. 315; *Norris* v. *Crocker,* 13 How. 429; Sedgw. Stat. Law, 126.

"Now, between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the Court; it thus permits what the first law prohibits.

"Again; the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

"Again; the act of 1813 declares that the fine, when imposed, shall not be less than $500. The act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.

"When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated.

"One of the earliest cases on this subject is that of *Rex* v. *Cator,* reported in 3 Burrows, 2026. There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offense, a fine of 100 pounds and three months imprisonment; for the second offense, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offense, a fine for 500 pounds and twelve months' imprisonment; for the second offense the fine was 1000 pounds and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis,* 1 Leach (C. C.) 271, it appeared that there were two statutes against killing deer in an inclosed park. The first statute made the offense a felony punishable with death. The last statute punished the first offense with a fine, and made the second offense a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offense of felony.

"There are numerous cases in the modern reports to the same effect.' We will cite only one, which was decided in this Court, that of *Norris* v. *Crocker,* 13 How. 429. In that case the defendants were sued in an action of debt to recover the penalty of $500 upon the 4th section of the act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice, and persons escaping from the service

of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offenses the sum of $500, to be recovered by the claimant in an action of debt..

"Pending the action brought under this section against the defendants, Congress, in 1850 (9 Stat. at L. 462) passed an act amendatory of and supplementary to the act of February, 1793, the 7th section of which embraces the offenses specified in the act of 1793, and creates new offenses, and affixed to each a different punishment from that named in the old act, prescribing a fine not exceeding 1000 pounds, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit and pay, by way of civil damages, to the party injured, the sum of $1000 for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending that had accrued to him; and that the Court would not favor repeals by implication. But the Court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was 'Not open to controversy, that when a new statute covers the whole subject of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that the former

statute is repealed by implication, as the provisions of both cannot stand together.'

"By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the Court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the Court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: 'The repeal of the law imposing the penalty is of itself a remission.' *Md.* v. *R. Co.*, 3 How. 534. In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offense remaining for the Court to punish in virtue of that section."

It follows therefore, that 593(b), in consequence of the holding of the Court, if it is correct, acts as a repeal of the National Prohibition Act with respect to the importation of liquor. If that be so, the judgment of conviction based as it is in this case, on the violation of a statute, to wit, the National Prohibition Act, Section 3, Title 2 thereof, which has been repealed, if the holding of the Court is correct, must be set aside.

The case of

United States v. *Tynen, supra,*

so holds. The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions started and concluded while it was an existing law.

Ex parte McCardle, 7 Wall. 514, 19 L. Ed. 264;
Norris v. *Crocker*, 13 How. 429, 14 L. Ed. 210.

It is significant to note that the indictment charges that the illegality consisted of the importation of liquors contrary to Section 3, Title 2 of the National Prohibition Act. If that act has been repealed, there can be no illegality in the importation of the intoxicating liquors. It flows, therefore, from the assumption that the Court is correct in its holding, that the importation of intoxicating liquor could not have violated the National Probitition Act if that act was repealed by Section 593(b). It seems, therefore, that the only way in which the judgment of conviction can be justified is in the holding that the National Prohibition Act, Section 3, Title 2, was in force and effect at the time, and not repealed, and that the penalty thereunder provides for a maximum fine of $500 in accordance with Section 29.

Conclusion.

For the foregoing reasons it is submitted that the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court to supervise jurisdiction by issuing the Writ of Certiorari.

Respectfully submitted,

Louis Halle

Counsel for Petitioner.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 576.

JOHN T. CALLAHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER

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BRIEF ON BEHALF OF PETITIONER

Opinions Below.

The opinion of the District Court overruling a demurrer (R. 8-9) is reported *sub nom United States* v. *Newton* in 36 Fed. (2) 425. The opinion of the Circuit Court of Appeals (R. 146-150) is reported *sub nom Callahan* v. *United States,* 53 Fed. (2d) 467.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered October 29, 1931 (R. 151) and a petition for a rehearing denied November 27, 1931 (R. 151). The petition for certiorari was filed December 16, 1931 and the writ granted January 25, 1932. Petitioner invoked the jurisdiction of this Court under section 248 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether petitioner should have been prosecuted and sentenced under the National Prohibition Act instead of under Section 593(b) of the Tariff Act of 1922.

2. Whether the indictment spelled out an offense under section 593(b) of the Tariff Act of 1922.

3. Whether petitioner, guilty of a violation of the National Prohibition Act, may be sentenced under section 593(b) *of the Tariff Act of 1922.*

Statutes Involved.

The pertinent provisions of the Tariff Act of 1922 and the National Prohibition Act, as well as of the Willis-Campbell Act and the Jones Act, are printed in the Appendix.

Statement.

The petitioner was found guilty upon the first count of an indictment returned in the United States District Court for the District of Delaware, which purported to charge the importation of intoxicating liquor in violation of section 593(b) of the Tariff Act of 1922 (R. 3, 4). The count charged that certain named defendants, on November 10, 1927—

> "did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware * * * certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit * * * all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the Provisions of Section 593, Subdivision B of the Act of Congress of Sep-

tember 21, 1922, known as the Tariff Act of 1922 * * *."

The count then alleged that the importation was illegal in that the merchandise was brought into the United States:

(*a*) Without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the Tariff Act of 1922.

(*b*) Without payment of the customs duties thereon as required by the aforesaid schedule.

(*c*) And in that said merchandise was imported and brought into the United States in violation of Section 3, Title II, of the National Prohibition Act.

In a separate paragraph of the count petitioner was charged with aiding and abetting the other defendants in the alleged offense (R. 4). The second count of the indictment was dismissed by the United States Attorney at the trial (R. 124).

A demurrer filed by the petitioner was overruled, the trial court holding that in so far as the allegations of paragraph (c) were concerned, the indictment stated an offense (R. 8-9).

The case, therefore, went to the jury upon the allegations of the first count charging the petitioner with aiding and abetting the importation of intoxicating liquor contrary to the provisions of Section 3, Title II, of the National Prohibition Act, and therefore "contrary to law." Petitioner was convicted (R. 136) and sentenced to the penitentiary for a year and a day and to pay a fine of $2,500 (R. 141).

POINT I.

The Court erred in refusing to dismiss the indictment on the ground that the same does not spell out an offense under Section 593(b) of the Tariff Act of 1922.

(a) The petitioner should have been prosecuted and sentenced under the National Prohibition Act instead of under section 593(b) of the Tariff Act of 1922.

(b) The indictment did not spell out an offense under section 593(b) of the Tariff Act of 1922.

The importation of intoxicating liquors contrary to the National Prohibition Act, Section 3, Title II thereof, is an offense created entirely by that statute. Section 593(b) of the Tariff Act of 1922 did not supersede the National Prohibition Act regarding importation, and though later in time, is not necessarily inconsistent therewith. Section 593(b) does not prohibit the importation of intoxicating liquors as does the National Prohibition Act. In fact, under Section 593(b) of the Tariff Act of 1922, intoxicating liquor may be imported if done so in accordance with Schedule 8. Consequently the Tariff Act of 1922 and any part thereof cannot be deemed to be inconsistent with the National Prohibition Act regarding the importation of intoxicating liquors, and to hold that it superseded the National Prohibition Act was error.

The Circuit Court in rendering its opinion relies in the main on the case of

Bookbinder v. *United States* (C. C. A. 3) 287 Fed, 790.

The Court holds a correct interpretation of this case to be that since it was decided prior to the passage of the Willis-Campbell Act, and while in the opinion in that case Judge

WOOLLEY suggested that the Prohibition Act may have repealed the provisions of the Tariff Act as it affected actual importation, the case was decided upon other provisions of the Tariff Act which were not affected by the unlawful importation provisions of the Prohibition Act. The Willis-Campbell Act was passed November 23rd, 1921. The *Bookbinder* case, *supra,* was decided March 13, 1923, two years later. The indictment in the *Bookbinder* case, however, was returned in September, 1921, but the opinion, nevertheless, discusses the force and effect of both the Willis-Campbell Act and the case of

United States v. *Stafoff,* 260 U. S. 477, 67 L. Ed. 358,

on the subject matter at hand.

But of paramount importance is the statement in the *Bookbinder* case, *supra,* found at page 794:

> "And the same difference maintains between the case of *United States* v. *McKenzie* (D. C.) 283 Fed. 667, and the case at bar. There the Court held that the identical section (R. S. Sec. 3082). was repealed by the National Prohibition Act. In that case the charges of the indictment were the importation, transportation, and the smuggling of liquors, all of which offenses the National Prohibition Act, the later statute, specifically denounces and for which it provides specific penalties. The *McKenzie* case differs from the case at bar in that it dealt with importation of liquor while the case at bar has to do with receiving and concealing liquor unlawfully imported. About this the National Prohibition Act says nothing."

It would seem that the reasoning of the Circuit Court of Appeals in this Circuit in the *Bookbinder* case is controlling notwithstanding the passage of the Willis-Campbell Act or the decision of this court in the *Stafoff* case.

The fact that the merchandise involved is intoxicating liquor, the importation of which was prohibited by the National Prohibition Act, created an offense which did not exist under the old laws, and therefore the supplemental act did not change the complexion of Section 593(b) of the Tariff Act of 1922. The language of the Willis-Campbell Act, and as this Court has observed in its opinion wherein it cites the holding of the United States Supreme Court in the *Stafoff* case, shows beyond doubt that the supplemental act refers only to

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force when the National Prohibition Act was enacted shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act."

It follows that such enactment cannot be invoked in the present case for the law involved herein is *Section 593(b) of the Tariff Act of 1922 which is not a law regarding "the manufacture and taxation of and traffic in intoxicating liquor."*

It is too clear for argument that Section 593(b) of the Tariff Act of 1922 does not relate to the manufacture or taxation of intoxicating liquor. It is quite apparent too that it does not relate to traffic in intoxicating liquor. The word "traffic" is defined in

> *Bouvier's Law Dictionary,* Rawle's Third Revision, Volume 3 at page 3307

as follows:

> "Traffic. Commerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing

> of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics or a trader, a merchant. *Senior* v. *Ratterman,* 44 Ohio St. 673, 11 N. E. 321."

It is contended that the learned Circuit Court of Appeals has mistaken the force and effect of the decision of this Court in the *Stafoff* case, and has broadened the holding of that case beyond its scope. The *Bookbinder* case, *supra,* is still the law of this Circuit and is not in conflict with the *Stafoff* decision.

But assuming without conceding that section 593(b) is a law regarding traffic in intoxicating liquor, nevertheless there is the same direct conflict between it and sections 3 and 29 of the National Prohibition Act as between section 3450 of the Revised Statutes and section 26, which were held to be in direct conflict to the extent of the penalty provision. So, too, are sections 3 and 29 directly in conflict with section 593(b).

> *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 74 L. Ed. 1016.

Accordingly the penalty provision of section 593(b) does not continue in force. (Section 593[b] stems back to Revised Statutes, section 3082.)

It is respectfully submitted that the Circuit Court erred in its construction of the case of

> *Gillespie* v. *United States* (C. C. A. 2), 13 Fed. (2d) 736,

regarding which the Circuit Court states as follows (R. 148):

> "An importation takes place whenever merchandise is brought within the territorial waters of the United States with intent to illegally bring said merchandise into the country."

The Court in the case, *Gillespie* v. *U. S., supra,* at page 737, states:

> "Plaintiffs-in-error, however, are not accused of 'running' this liquor, or of any offense under the National Prohibition Law; nor does that statute have any connection with their crime; except to render the bringing into the United States of the whisky in the manner above described unlawful, for reasons not necessarily having a connection with revenue."

The Court goes on to say:

> "The statute relied upon, and above quoted, does not speak of smuggling; the statutory words in section 593(b) are to *'bring into* the United States.' It is in section 593(a) that punishment is prescribed for one who 'smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced,' etc."

And at page 738 of the case the Court expressly shows the circumstances under which Section 593(b) may be invoked for an unlawful importation of intoxicating liquors by definitely and conclusively stating as follows:

> "In fact, all the whisky still on the tug, while it was not yet smuggled, was in the United States and unlawfully brought there, because, as charged in the indictment, it was brought in without a permit."

This case is distinguishable from ours on the common grounds with the case of

> *Keck* v. *United States,* 172 U. S. 434, 43 L. Ed. 505,

which reversed the lower Court and dismissed an indictment for the identical absence of an allegation of the

alleged illegality of the importation. A similar situation presents itself in our case where there is an absence of a statement in the indictment that the liquor was aboard the vessel within the territorial waters of the United States without a permit.

Yet the *Gillespie* case wherein the Court holds as *supra* cited that the goods would be brought into the United States contrary to law, does not hold that that would be contrary to Section 593(b) and it is conceded, and we argue and contend for the fact that it would be contrary to law but contrary only to the National Prohibition Act which condemns such importation. That this construction of the *Gillespie* case is a true one is apparent in the Court's statement relied on at page 738 where it states:

> "The first count in the *Keck* case was based on R. S. Sec. 3082 (Comp. St. Sec. 5785), substantially identical with section 593(b) of the Tariff Act of 1922. That count was held insufficient—and there was no dissent on this point—because of the failure to specify in the indictment in what way the importation was contrary to law. In the indictment before us it is specifically charged in the allegation that the importation was without the required permit."

Furthermore, in the *Gillespie* case the charge against the defendants was facilitating the transportation, concealment, etc., of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law. This is not an offense under the National Prohibition Act. The Court does not pass upon the point involved in our case, and so much of the ruling as is dicta, is unquestionably in support of our contention. The real gist of the holding of the *Gillespie* case may be found at page 738:

> "However inartistic the indictment in this case may be, it is clear that it was intended to charge the offense created by section 593 (b), and not that created by section 593(a). These defendants are not charged with having smuggled the goods, or with being accessories to the smuggling; they are charged with having facilitated the transportation of the goods after they had been smuggled, and with knowledge that they had been brought into the country contrary to law."

In that respect the indictment was treated identically as it was in the *Bookbinder* case, *supra.*

The National Prohibition Act does not denounce concealment or facilitation in transportation after illegal importation of intoxicating liquor.

The case of

McGill v. *United States,* 28 Fed. (2d) 572

seems determinative. The same considerations of the indictment and the proof govern here as in the *McGill* case, *supra,* and in

Keck v. *United States, supra.*

Can it with reason be held that if there were a permit to import the liquor in question that the facts nevertheless would substantiate a violation of Section 593(b) of the Tariff Act of 1922 in the absence of a showing that opportunity had been afforded for the payment of duties and that a customs barrier had been passed without such payment? In short, importation under the Tariff Act is not synonymous with or identical to importation under the National Prohibition Act. Under the former, merchandise at a definite point and within a definite time must be properly declared, and upon failure to comply, upon the passing

of a customs barrier, the act of importation is complete. Under the latter, a mere carriage of intoxicating liquors for beverage purposes into the territorial waters of the United States without a permit incurs liability under Section 3, Title II of the National Prohibition Act. No more has been shown than the coming into the territorial waters of the United States of a vessel upon which there was a cargo of intoxicating liquor (R. 51-54, fols. 68-71). The demurrer to the indictment was sustained in so far as the indictment referred to any acts other than the act of coming within the territorial waters with a cargo of intoxicating liquors.

The indictment having been stripped by the District Court's decision (R. p. 8, fol. 12) sustaining so much of the demurrer as refers to (1) the importation as contrary to law in that it was made without a permit from the Commissioner of Internal Revenue, (2) without payment of the customs duties thereon as required by Schedule 8 of the Tariff Act of 1922, leaves nothing except the allegation that the importation was in violation of Section 3, Title II of the National Prohibition Act. There is no general prohibition against the importation of intoxicating liquors in the Tariff Act. In fact, intoxicating liquors may be imported. In all the authorities found, whenever Section 593(b) of the Tariff Act of 1922 was invoked, there was present in the indictment and in the proof, facts showing the character of the violation directly contrary to some specific provision of the Tariff Act. *In that respect the case at bar is distinguishable from all those authorities, regardless of how they may be construed, for in none of them was there simply and solely an alleged illegal importation by virtue of the violation only of Section 3, Title II of the National Prohibition Act.*

Kurczak v. *United States*, 14 Fed. (2d) 109;
United States v. *Cardwell*, 9 Fed. (2d) 146;
Nounes v. *United States*, 4 Fed. (2d) 833;
Bookbinder v. *United States, supra.*

It is respectfully urged that Congress intended that a fine be imposed of $500 as a maximum for the importation of intoxicating liquors on the dates specified in the indictment (November 10, 1927). That under the circumstances of this case and under the indictment as reduced by the Court's ruling on the demurrer, that the violation of law, if any, was a prohibition violation and that Congress has imposed the penalty in Section 29 of the National Prohibition Act. To invoke under circumstances such as these, in the face of an indictment such as this, Section 593 (b) of the Tariff Act of 1922 is to subvert the direct command of Congress as expressed in Section 3, Title II of the National Prohibition Act and to invoke a more severe penalty by reason of the artifice of a pleader who has invoked a tariff regulation which Congress had no intent of using in a fact situation as presented here.

And too, the arrest was made of persons in the act of transporting intoxicating liquor in violation of law and the vessel seized (R. 51-54, fols. 68-71). The mandatory provisions of Title 2, Section 26 of the National Prohibition Act govern.

Richbourg Motor Co. v. *United States, supra.*

That section provides inter al:

> "Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; * * *"

The applicable provision "of this chapter" is found in Title 2, Section 3 thereof, which relates to the offense of importation.

As stated in the *Richbourg* case, by Mr. Justice STONE:

> "No tenable ground of distinction is suggested which would enable us to say, where forfeiture is involved, that the preceding requirement of the section, that the proceedings against the person arrested 'shall be under the provisions of this title,' is any less so."

If, in the case at bar the mandatory provisions of section 26 do not control, nevertheless the National Prohibition Act (Sections 3 and 29) is paramount by reason of the inconsistency between it and section 593(b) of the Tariff Act—just as section 3450 and section 26 are inconsistent, the latter being less drastic and treating specifically with intoxicating liquor.

In the case of

United States v. *Dowling*, 278 Fed. 630,

the Court at page 641 discusses the effect of the passage of the Volstead Act on the existing statute, Section 3082 of the Revised Statutes which is substantially identical to Section 593(b) of the Tariff Act of 1922. The Court at page 641, states:

> "The fifth and sixth grounds of demurrer to count No. 4 of indictment 1424 show an additional reason why it is insufficient. These grounds are:
>
> "'(5) Section 3082 of the Revised Statutes of the United States, as applied to intoxicating liquors for beverage purposes, has been repealed by the Eighteenth Amendment to the Constitution and the National Prohibition Act.
>
> "'(6) Section 3082, of the Revised Statutes of the United States, as applied to intoxicating liquor for beverage purposes, has been superseded by the National Prohibition Act.'

"Considering these grounds of demurrer, I think the passage of the Volstead Act impliedly repealed section 3082 of the Revised Statutes. It is noted that the Volstead Act is a later act than sec. 3082 and that the Volstead Act imposes penalties of less severity than those imposed by section 3082. In the case of *U. S.* v. *Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 66 L. Ed. ....; the holding was as follows:

" 'Existing penal statutes are repealed by later ones covering practically the same acts, but fixing lesser penalties.'

"Also see *U. S.* v. *Windham* (D. C.) 264 Fed. 376.

"Section 3082 is the smuggling statute, and it imposes a penalty of $5,000 and two years' imprisonment upon any one found guilty of knowingly assisting in smuggling. Section 3 of the Volstead Act prohibits importation of intoxicating liquors, and section 29 provides that, for violations where a special penalty is not provided, the punishment shall be a fine of not more than $500. So the ground is fully covered by the Volstead Act, as it is a later statute, and as the penalty prescribed by it is less than that prescribed by section 3082, R. S. section 3082 would also appear to come within the provisions of section 35 of the Volstead Act, which provides for the repeal of conflicting acts to the extent of the conflict."

And in the case of

Bruno v. *United States*, 289 Fed. 649,

the Court at page 656 states:

"It is evident that the infractions of law denounced in section 3082 as 'contrary to law' are those defined in the provisions of the customs laws (*U. S.* v. *McKenzie* (D. C.) 283 Fed. 667, 668), not those defined in the National Prohibition Act, and

that, if the defendant was found guilty under the first two counts of violating section 3 of title 2 of the Prohibition Act, such violation was not an infraction of section 3082. It is also evident that the punishment provided for a violation of section 3 of title 2 is found in section 29 of that title, and is less than that provided in section 3082. It follows that the defendant could not lawfully be tried and sentenced under counts 1 and 2 for a violation of section 3, as a violation of that section is not an act denounced by section 3082, and the punishment provided for such violation in section 29 is less than that provided in section 3082. We therefore regard the first two counts as bad."

For cases of like import see

United States v. *Puhac,* 268 Fed. 392;
United States v. *Turner,* 266 Fed. 248;
Reed v. *Thurmond, United States Attorney,* 269 Fed. 252.

As stated in

United States v. *Turner, supra,* at p. 251:

"When the identical offense denounced by an old statute under a heavy punishment is by a more recent statute made punishable with less severity, there is inconsistency. The intent shown by the recent statute is repugnant to and contradictory of an intent to keep in force the old statute."

This Court in

United States v. *Ryan,* 76 L. Ed. ...., Adv. Opinions No. 3, page 71 at page 75

held:

"All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever

> a reasonable application can be given which is consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354, 70 L. ed. 986, 46 S. Ct. 513; * * *."

That the National Prohibition Act was intended to suppress the entire traffic in intoxicating liquor as a beverage appears from this Court's own opinion in

> *United States* v. *Katz*, 271 U. S. 354, 70 L. ed. 986, 46 S. Ct. 513,

and in

> *Grogan* v. *Hiram Walker & Sons*, 259 U. S. 80, 89, 66 L. Ed. 836, 839.

If section 593(b) has any force and effect to a transaction involving intoxicating liquors it can only refer to persons authorized under the provisions of the National Prohibition Act to deal in such intoxicating liquors.

> *United States* v. *Katz*, *supra*.

That the *Stafoff* case was no authority for the proposition that the Willis-Campbell Act placed a new complexion on the applicability of section 593(b) to a liquor violation appears from this Court's own statement in the opinion in that case at page 361 as follows:

> "There remain the questions certified in *Brooks* v. *United States*. They are somewhat broader than we indicated in our summary statement, as they include the revenue laws generally as well as the sections 3258, 3281, and 3282. The general question manifestly is too broad to require an answer."

As stated by this Court in

> *United States* v. *Yuginovich*, 256 U. S. 450, 65 L. Ed. 1043, at 1046:

"It is well settled that in cases of this character the construction or sufficiency of the indictment is not brought before us. *United States* v. *Keitel,* 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; *United States* v. *Stevenson,* 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35. For the purpose of interpreting the statute we adopt the meaning placed upon the indictment by the Court below. *United States* v. *Colgate & Co.,* 250 U. S. 300, 63 L. ed. 992, 7 A. L. R. 443, 39 Sup. Ct. Rep. 465. As that Court evidently construed the statutes upon the assumption that the charges had relation to intoxicating liquors intended for beverage purposes, we shall follow that view of the indictment in determining whether the former statutes are still in force.

"Section 35 (in the margin) in its first sentence repeals all prior acts to the extent of their inconsistency with the National Prohibition Act,—to that extent and no more,—* * *"

It is evident from the holdings in *Dowling's* and *Bruno's* cases, *supra,* that the Court has interpreted the intent of Congress in passing the Volstead Act to be that such enactment was to make the act all-dominant and controlling so far as relates to the importation of intoxicating liquors. It appears illogical to assume that the Volstead Act which particularly relates to intoxicating liquors shall have been superseded by the Tariff Act of 1922 which is all-embrasive in its intendment.

We respectfully contend that the words "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 means contrary to some law which itself does not prescribe a penalty. It has no reference to any law which if violated prescribes the punishment therefor. This is particularly true where Congress as here, created the offense in Section 3, Title II of the National Prohibition Act and has imposed

the punishment for the violation. Furthermore, "contrary to law," as used in this said section and as held by this Court in this opinion refer to Section 3, Title II of the National Prohibition Act as being the law contrary to which the alleged importation was committed.

It is elementary that the facts of an indictment govern; that the pleader's nomination of a particular statute does not render the indictment invalid if such statute does not cover the fact situation. The Court nevertheless will proceed to sentence if a conviction is obtained under the applicable statute.

Williams v. *United States,* 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

The indictment herein names Section 593(b) on a fact situation (after demurrer) which can only refer to the National Prohibition Act. Of course, the statement in the indictment "the said defendants then and there well knowing that such merchandise was so imported and brought into the United States as aforesaid," which immediately succeeds the statement, "in that said merchandise was then and there by said defendants imported and brought into the United States in violation of Section 3, of Title II of the National Prohibition Act," means exactly what it states, and that is to say, that the importation was in violation of the National Prohibition Act. The interpretation and construction of "contrary to law," as used in Section 593(b) of the Tariff Act of 1922 may be correct, and yet this indictment in its language does not support such construction.

Section 593(b) of the Tariff Act does not fix a special penalty for the importation of intoxicating liquor. It does not deal specifically with intoxicating liquor. In fact, im-

portation of intoxicating liquor is not prohibited under the Tariff Act of 1922. It is only the importation of merchandise in general to which the Tariff Act of 1922, Section 593(b) thereof, relates. On the other hand, the National Prohibition Act prohibits not the importation in general of merchandise but specifically of intoxicating liquor. It prescribes and fixes a penalty therefor. The penalty, like many others for violations of the terms of the National Prohibition Act, is found in Section 29 thereof. Indeed, if there were no penalty imposed under the National Prohibition Act for the importation of intoxicating liquors, the importation thereof would be no offense, for there can be no offense without a penalty.

United States v. *Seibert*, 2 Fed. (2d) 80.

If the National Prohibition Act was superseded with regard to importation of intoxicating liquors by Section 593(b), then there is no additional force and effect created by the Jones Act which raises the punishment for the illegal importation of intoxicating liquors to five years' imprisonment and a fine of $10,000 and directs that the change be effective in regard to the National Prohibition Act without in any manner referring to Section 593(b) of the Tarff Act of 1922. The only extent to which Section 593(b) can be held to have superseded the National Prohibition Act is in reference to offenses which Section 593(b) specifically create and which are not to be found in the National Prohibition Act—otherwise, both statutes would be inconsistent.

POINT II.

The sentence of the Trial Court was erroneous and void by reason of Section 29 of the National Prohibition Act which governs.

(a) The petitioner, in effect, was found guilty of a violation of the National Prohibition Act.

(1) The contention here made is that, assuming without conceding, that the indictment in the case at bar has in it all the ingredients essential to constitute the offense of importation denounced by the National Prohibition Act, that the sentence of the Court imposing a fine and imprisonment of one year and a day against the defendant was void, at least in so far as it exceeds the penalty imposed under the terms of the National Prohibition Act, Section 29. It has already been pointed out that Section 593(b) is a general statute which imposes a penalty for the importation of merchandise in general contrary to law. It is urged that "contrary to law" as used in Section 593(b) means contrary to such laws which do not provide for the imposition of a penalty for their infraction. Section 593(b) of the Tariff Act of 1922 is a general statute fixing a punishment therein for the violation of laws or enactments governing and controlling the manner in which merchandise in general may be brought into the United States. The failure to have a permit, the failure to pay duties as prescribed, and the failure to properly mark packages and stamp them, all of which are prescribed by law, and for none of which a penalty for the violation of which is prescribed: these are the laws which Section 593(b) may be invoked to impose its sanction upon, but for the violation of a statute which creates an offense and imposes a penalty—for such offenses it is contended that

Section 593(b) may not be invoked unless it can be construed to be a repealer of such other statute or unless the intent of Congress can be gleaned from the two statutes under consideration and the later statute interpreted as superseding the former one.

The National Prohibition Act denounces an illegal importation of intoxicating liquors. It prescribes the penalty therefor under Section 29 thereof.

In the case of

Baily v. *Allan E. Walker,* 2 Fed. (2d) 123 at page 124

we find this canon of statutory construction which applies to the case at bar:

> "It is elementary in the interpretation of statutes that specific provisions relating to a given subject shall prevail over more general ones relating to a class of which the particular subject is but a part, unless the context or some other proper basis of construction clearly shows a different legislative purpose."

See also:

United States v. *Zenith Radio Corp.,* 12 Fed. (2d) 614.

In the case of

Simon v. *Simon,* 26 Fed. (2d) 530,

at page 532, the Court holds:

> "It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as

an exception to the general statute. *Ex parte Crow Dog,* 109 U. S. 556, 570, 3 S. Ct. 396, 27 L. Ed. 1030; *Rodgers* v. *United States,* 185 U. S. 83, 87, 88, 89, 22 S. Ct. 582, 46 L. Ed. 816."

That Congress clearly intended that Section 3 of Title 2 of the National Prohibition Act be applied to the illegal importation of intoxicating liquors becomes an unassailable fact when viewed in the light of the language of the Jones Law. By that enactment which in point of time was seven years later than the Tariff Act of 1922, we find Congress effected a change in the sanction under Section 29 with respect to, among other things, a prosecution for the importation of intoxicating liquor. By this enactment the penalty imposed for the offense of importation under the National Prohibition Act was increased to a fine not to exceed $10,000 or imprisonment not to exceed five years or both. To say that Congress intended the Tariff Act of 1922, Section 593(b) thereof to be used in a prosecution for an illegal importation of intoxicating liquor is to refuse to recognize the expression of the intent of Congress as exhibited in the Jones Act *supra.* Congress never intended the Tariff Act of 1922 to impose a sentence or a penalty for the illegal importation of intoxicating liquors in violation of the National Prohibition Act. As late as 1929 Congress, in enacting the Jones Law, was satisfied that the National Prohibition Act imposed a penalty for importation of intoxicating liquors. To hold, as the Trial Court did in this case, that Section 593(b) of the Tariff Act of 1922 superseded Section 29 on the ground that a specific penalty for the illegal importation is provided for in Section 593(b) is in effect a holding that importation of intoxicating liquors under the National Prohibition Act is no offense.

See

United States v. *Seibert, supra.*

Furthermore, under the Tariff Act of 1922, Paragraph 801, Schedule 8, which provides for the import duties on spirits, wines and other beverages reads as follows:

> "Nothing in this Schedule shall be construed as in any manner limiting or restricting the provisions of Title 27 (The National Prohibition Act, as amended)."

This is an unequivocal expression of the intent of Congress that the Tariff Act of 1922 should affect its own field of legislation and in no manner trespass upon the terms of the National Prohibition Act.

Unless a punishment is provided, a statute does not create a crime. Furthermore, the Jones Act would be utterly ineffective with respect to importation of intoxicating liquor if the Court below was correct. Anyone commercializing on a large scale the importation of intoxicating liquors who would be indicted under the Jones Act for such importation could argue on the basis of the Court's decision in this case, that with respect to the importation of intoxicating liquors, the Tariff Act of 1922, Section 593(b) superseded importation under the National Prohibition Act and the penalty therefor. It would also follow that the Jones Act was a nullity so far as importation is concerned by reason of the fact that it effects a change in a statute, already superseded. In this connection another well-established canon of statutory construction effectively comes into play. We find it well stated in the case of

Washington Railway, etc. v. *District of Columbia,* 10 Fed. (2d) 999, at page 1001:

> "It is a well established rule that repeals by implication are not favored, and that a general statute without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent."

At this point let us revert to Point I of this brief in which the respective roles to be played by Section 3, Title 2 of the National Prohibition Act, and Section 593(b) have been pointed out. The latter statute may be invoked as an aid to the enforcement of the National Prohibition Act, when coupled with the illegal importation, there is the receipt and concealment thereof after importation. To hold that Section 593(b) may be invoked for the illegal importation of intoxicating liquor, providing its illegality is shown to be in violation of the Tariff Act of 1922, in which case 593(b) may be deemed to be co-extensive in its application with Section 3, Title 2 of the National Prohibition Act does not dispose of the problem in the case at bar for the reason that the indictment failed to incorporate in it any illegality embraced by the terms of the Tariff Act of 1922 after the demurrer to it had been interposed.

The statement in the indictment that the acts complained of were contrary to Section 593(b) of the Tariff Act of 1922 is a conclusion of the pleader and may be disregarded, and if the facts in the indictment are sufficient to state a cause of action and sufficiently inform the accused of the nature of the charge against him, such an indictment will be sustained under the proper statute applicable thereto.

Harper v. *U. S.*, 27 Fed. (2d) 77 at page 79:

> "The fact that the pleader has misstated the number of the section is immaterial, it being suffi-

cient if the language fully states an offense denounced by the federal statutes. *Johnson* v. *Biddle* (C. C. A.) 12 F. (2d) 366 at 369; *Taylor* v. *U. S.* (C. C. A.) 2 F. (2d) 444. In the latter case it is held that reference by number to the wrong section of the Criminal Code as the one under which the indictment is brought does not affect or defeat the indictment. An indictment is nothing more than a pleading, and its sufficiency must be determined by the facts therein set forth. The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion, which may or may not be correct, and neither adds nor detracts from the allegations."

If the indictment can be justified at all, it can only be under the terms of the National Prohibition Act. The sentence therefore, upon conviction of the defendant should have been imposed under and in accordance with the terms of Section 29 of the National Prohibition Act. In imposing a sentence of imprisonment when the said section imposes at maximum a fine of $500, the Trial Court imposed a void sentence as it was without jurisdiction in doing so.

To raise an offense from the degree of a misdemeanor to that of a felony, Congress must specifically by statute state its intention so to do.

Under the National Prohibition Act, importation of intoxicating liquor prior to the Jones Act, was a misdemeanor, the punishment therefor being at maximum the fine of $500. Section 29, Section 541, Title 18, U. S. C. A., Cr. Code Sec. 335. If Section 593(b) may be invoked, a sentence of two years or a fine of $10,000 or both may be incurred. The violation of this statute, therefore, constitutes a felony. Nothing in Section 593(b) indicates any intention on the part of Congress to raise the crime of importing intoxicating liquors to the degree

of a felony. It was a misdemeanor up until specific legislation changing it into a felony was enacted by the Jones Act, *supra*.

See:

Ross v. *U. S.*, 37 Fed. (2d) 557.

(2) A conviction under an indictment based on a violation of the Prohibition Act and a sentence under Section 593 (b) of the Tariff Act are inconsistent.

The Court, in holding that Section 593(b) superseded so far as the penalty is concerned, Section 29 of the National Prohibition Act regarding importation of liquor was in error. For the purpose of this point, counsel will assume that Section 593(b) did effect a change in the law with regard to the importation of intoxicating liquors. Thus it will not be contended here that Section 593(b) found as it is in a separate body of law, wholly apart from and independent of the National Prohibition Act cannot, in the absence of a specific reference to the later statute, effect a change, even though it was enacted subsequent in time, and it will not at this time be contended that the raising of the sanction and the status of the offense from a misdemeanor to a felony or an infamous crime, cannot be accomplished without an unequivocal expressed intent found in the language of the enactment itself. But it will be entirely assumed, without conceding, that the Court was correct in its holding that penalties imposed under 593(b) superseded Section 29, and counsel wishes to point out to this Court the inevitable consequences that follow from such a holding in the light of the authorities on the subject.

The leading authority is the case of

United States v. *James Tynen*, 20 L. Ed. 153, 11 Wall. 88-95.

The pertinent language is as follows:

"There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is given effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairbairn*, 3 How. 636; *Bartlett* v. *King*, 12 Mass. 587; *Com.* v. *Cooley*, 10 Pick. 37; *Pierpont* v. *Crouch*, 10 Cal. 315; *Norris* v. *Crocker*, 13 How. 429; Sedgw. Stat. Law, 126.

"Now, between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes the punishment for the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the Court; it thus permits what the first law prohibits.

"Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

"Again; the act of 1813 declares that the fine, when imposed, shall not be less than $500. The act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.

"When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated.

"One of the earliest cases on this subject is that of *Rex* v. *Cator*, reported in 3 Burrows, 2026. There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offense, a fine of 100 pounds and three months' imprisonment; for the second offense, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offense, a fine of 500 pounds and twelve months' imprisonment; for the second offense the fine was 1000 pounds and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis*, 1 Leach (C. C.) 271, it appeared that there were two statutes against killing deer in an inclosed park. The first statute made the offense a felony punishable with death. The last statute punished the first offense with a fine, and made the second offense a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offense of felony.

"There are numerous cases in the modern reports to the same effect. We will cite only one, which was decided in this Court, that of *Norris* v. *Crocker*, 13 How. 429. In that case the defendants were sued in an action of debt to recover the penalty of $500 upon the 4th section of the act of Congress of February, 1793 (1 Stat. at L. 302), respecting fugitives from justice, and persons escaping from the service

of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offenses the sum of $500, to be recovered by the claimant in an action of debt.

"Pending the action brought under this section against the defendants, Congress, in 1850 (9 Stat. at L. 462) passed an act amendatory of and supplementary to the act of February, 1793, the 7th section of which embraces the offenses specified in the act of 1793, and creates new offenses, and affixed to each a different punishment from that named in the old act, prescribing a fine not exceeding 1000 pounds, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit, and pay, by way of civil damages, to the party injured, the sum of $1000 for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending that had accrued to him; and that the Court would not favor repeals by implication. But the Court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was 'Not open to controversy, that when a new statute covers the whole subject of an old one,

adds offenses, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together.'

"By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the Court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the Court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: 'The repeal of the law imposing the penalty is of itself a remission.' *Md.* v. *R. Co.*, 3 How. 534. In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offense remaining for the Court to punish in virtue of that section."

It follows therefore, that 593(b), in consequence of the holding of the Court, if it is correct, acts as a repeal of the National Prohibition Act with respect to the importation of liquor. If that be so, the judgment of conviction based as it is in this case, on the violation of a statute, to wit, the National Prohibition Act, Section 3, Title 2 thereof, which has been repealed, if the holding of the Court is correct, must be set aside.

The case of

United States v. *Tynen, supra,*

compels such conclusion. The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions started and concluded while it was an existing law.

Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264;
Norris v. *Crocker*, 13 How. 429, 14 L. Ed. 210.

It is significant to note that the indictment charges that the illegality consisted of the importation of liquors contrary to Section 3, Title 2 of the National Prohibition Act. If that act has been repealed, there can be no illegality in the importation of the intoxicating liquors. It follows, therefore, from the assumption that the Court is correct in its holding, that the importation of intoxicating liquor could not have violated the National Prohibition Act if that act was repealed by Section 593(b). The judgment of conviction can be justified only in the holding that the National Prohibition Act, Section 3, Title 2, was in force and effect at the time, and not repealed, and that the penalty thereunder provides for a maximum fine of $500 in accordance with Section 29.

Respectfully submitted,

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LOUIS HALLE,
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On the Brief.

Appendix.

Section 593(b) of the Tariff Act of 1922 (19 U. S. C. Sec. 497):

Fraudulently or knowingly importing or assisting in importing merchandise; buying, selling, transporting, or concealing unlawfully imported merchandise; punishment. If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000, nor less than $50, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.

Paragraph 813 of Schedule 8 of the Tariff Act of 1922:

No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

Section 3 of the National Prohibition Act (27 U. S. C. Sec. 12):

Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided,* That nothing in this chapter shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Section 29 of the National Prohibition Act (27 U. S. C. Sec. 46):

Punishment for unlawful manufacture or sale of liquor or violation of permits. Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more

than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Section 26 of the National Prohibition Act (27 U. S. C. Sec. 40):

Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any persons in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the

officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 5 of the Willis-Campbell Act (Nov. 23, 1921, c. 134, Sec. 5, 42 Stat. 223, 27 U. S. C. Sec. 3):

Effect on existing legislation. All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Jones Act, entitled "An Act to amend the National Prohibition Act," as amended and supplemented (27 U. S. C. Sec. 91):

Maximum penalties; petty offenses. Wherever a penalty or penalties are prescribed in a criminal prosecution by this title, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 4 of this title, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That any person who violates the provisions of this title, in any of the following ways: (1) by a sale of not more than one gallon of liquor as that word is defined by section 4 of this title: *Provided, however,* That the defendant has not theretofore within two years been convicted of a violation of this title or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon, in the production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both.

(27 U. S. C. Sec. 92);

Minimum penalties. Section 91 shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense provided by this title.

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FILE COPY

No. 576

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOHN T. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court overruling a demurrer (R. 11–13) is reported *sub nom. United States* v. *Newton* in 36 F. (2d) 425. The opinion of the Circuit Court of Appeals (R. 203–207) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1931 (R. 208), and a petition for rehearing denied November 27, 1931 (R. 223). The petition for certiorari was filed De-

cember 16, 1931. While petitioner does not so state, he presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner should have been prosecuted and sentenced under the National Prohibition Act instead of under Section 593 (b) of the Tariff Act of 1922.

STATUTES INVOLVED

The pertinent provisions of the Tariff Act of 1922 and of the National Prohibition Act are printed in the Appendix, *infra*, pp. 8–9.

STATEMENT

Petitioner was prosecuted upon the first count of an indictment returned in the United States District Court for the District of Delaware, which charged the importation of intoxicating liquor in violation of Section 593 (b) of the Tariff Act of 1922. (R. 5–6.) The count charged that certain named defendants, on November 10, 1927—

> did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon, into the territorial waters of the District of Delaware * * * certain merchandise, contrary to law, to wit, a large quantity of intoxicating

> liquor, to wit * * * all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the Provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922 * * *.

The count then alleged that the importation was illegal in that the merchandise was brought into the United States:

> (*a*) Without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the Tariff Act of 1922.
>
> (*b*) Without payment of the customs duties thereon as required by the aforesaid schedule.
>
> (*c*) And in that said merchandise was imported and brought into the United States in violation of Section 3, Title II, of the National Prohibition Act.

In a separate paragraph of the count petitioner was charged with aiding and abetting the other defendants in the alleged offense. (R. 6.) The second count of the indictment was dismissed by the United States Attorney at the trial. (R. 7–8, 165.)

A demurrer filed by the petitioner was overruled, the trial court holding that insofar as the allegations of paragraph (c) were concerned, the indictment stated an offense. (R. 9–13.)

The case, therefore, went to the jury upon the allegations of the first count charging the petitioner

with aiding and abetting the importation of intoxicating liquor contrary to the provisions of Section 3, Title II, of the National Prohibition Act, and therefore "contrary to law." Petitioner was convicted (R. 180) and sentenced to the penitentiary for a year and a day and to pay a fine of $2,500. (R. 194.) Upon appeal the conviction was affirmed (R. 207–208) and a petition for rehearing denied (R. 223).

ARGUMENT

The only contention presented in the petition for certiorari and supporting brief which was urged in the trial court or in the Circuit Court of Appeals (R. 10, 12, 205–207) is thus stated by the District Court in its opinion overruling petitioner's demurrer (R. 12):

> The theory upon which the defendant attacks the third allegation is that The National Prohibition Act not only prohibits the importation of intoxicating liquor but provides a penalty for so doing, that the penalty of this earlier special statute was not repealed by the later general statute, Section 593 (b) of The Tariff Act of 1922, and that, hence, importation of intoxicating liquor in violation of The National Prohibition Act is not a violation of Section 593 (b).

Section 3, Title II of the National Prohibition Act (*infra*, p. 9), so far as pertinent, prohibits the importation of intoxicating liquor for beverage purposes. That section contains no penalty pro-

vision, but it is provided in Section 29, Title II, (*infra,* p. 9) that any person who "violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500."

Section 593 (b) of the Tariff Act of 1922 (*infra,* p. 8) makes it an offense for any person fraudulently or knowingly to import or bring into the United States, or to assist in so doing, any merchandise, "contrary to law," and provides as a penalty that "such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both." The Act defines "merchandise" as meaning "goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited" (Sec. 401, 46 Stat. 708) and Schedule 8, which imposes certain duties on spirits, wines, and other beverages, provides (Par. 814, 46 Stat. 640) that—

> No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Prohibition, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws: * * *

and that (Par. 801 (a), 46 Stat. 639):

> Nothing in this schedule shall be construed as in any manner limiting or restricting the provisions of Title II or III of the National Prohibition Act, as amended.

The phrase "contrary to law" has been construed as embracing "any law in force at the time of an alleged violation of the statute, whether contrary to Customs Laws or, as in this instance, to the National Prohibition Act." *Bookbinder* v. *United States*, 287 Fed. 790, 795 (C. C. A. 3d), and cases cited (certiorari denied 262 U. S. 748).

The District Court, in deciding against petitioner, said (R. 12):

> It is, of course, well settled that a later statute, general in its terms, and not expressly repealing a prior special statute will ordinarily not affect the special provisions of such earlier statute. *Ex parte Crow Dog*, 109 U. S. 556, 570; *Simon* v. *Simon*, 26 Fed. (2d) 530, 532, 26 A. & E. Enc. of Law, 2d Ed. 739. But The National Prohibition Act prescribes no special penalty for importations in violation of that law. Instead, Section 29 of Title 2 of the Act contains an omnibus clause fixing penalties for violations for which no special penalty is fixed. As the subsequent Tariff Act of 1922 fixes a special penalty for importations of intoxicating liquors contrary to law, its provisions supersede, with respect to that offense, the omnibus clause of The National Prohibition Act.

Kurczak v. *United States*, 14 Fed. (2d) 109 (C. C. A. 6); *United States* v. *Cardwell*, 9 Fed. (2d) 146; *Nounes* v. *United States*, 4 Fed. (2d) 833 (C. C. A. 5).

We submit that the result reached in this decision is entirely sound.

In affirming the decision of the trial court the Circuit Court of Appeals relied upon its construction of the Willis-Campbell Act and upon the decision of this Court in *United States* v. *Stafoff*, 260 U. S. 477. We deem it unnecessary to discuss this view of the case, since it seems entirely clear that the result reached by the District Court was correct for the reasons stated.

CONCLUSION

We know of no conflicting decisions and submit that the case was correctly decided below. The petition should be denied.

Respectfully submitted.

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JANUARY, 1932.

APPENDIX

STATUTES INVOLVED

Section 593 (b) of the Tariff Act of 1922 provides in part:

> If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both. * * * (Act of September 21, 1922, c. 356, Title IV, 42 Stat. 858, 982; U. S. C., Title 19, Sec. 497.)

The above section was repealed as of June 18, 1930, by the Tariff Act of 1930, c. 497, Secs. 651 (a), 653, 46 Stat. 590, 762 (U. S. C. Sup. V, Title 19, secs. 1651, 1653), but Section 651 (c) of that Act (p. 763) provided that—

> * * * All offenses committed and all penalties, under any statute embraced in, or changed, modified, or repealed by this Act may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed. * * *

A provision identical in language with that quoted above from Section 593 (b) of the Tariff Act of 1922 was included in the Tariff Act of 1930. (Sec. 593 (b), c. 497, 46 Stat. 751; U. S. C. Sup. V, Title 19, sec. 1593.)

Section 3, Title II, of the National Prohibition Act, is in part as follows:

> No person shall * * * import * * * any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes * * * may be * * * imported * * * but only as herein provided, and the commissioner may, upon application, issue permits therefor * * *. (Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 308; U. S. C., Title 27, Sec. 12.)

Section 29, Title II, of the National Prohibition Act, reads in part:

> * * * * *
>
> Any person violating the provisions of any permit * * * or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500 * * *. (41 Stat. 316; U. S. C., Title 27, Sec. 46.)

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

No. 576

In the Supreme Court of the United States

OCTOBER TERM, 1951

JOHN T. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 576

JOHN T. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court overruling a demurrer (R. 8–9) is reported *sub nom. United States* v. *Newton* in 36 F. (2d) 425. The opinion of the Circuit Court of Appeals (R. 146–150) is reported in 53 F. (2d) 467.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1931 (R. 151), and a petition for rehearing denied November 27, 1931 (R. 151). The petition for certiorari was filed Decem-

ber 16, 1931, and was granted January 25, 1932. (R. 152.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner should have been prosecuted and sentenced under Section 593 (b) of the Tariff Act of 1922 upon the charge of fraudulently and knowingly importing intoxicating liquor.

STATUTES INVOLVED

Section 593 (b) of the Tariff Act of 1922 provides in part:

> If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both. * * * (Act of September 21, 1922, c. 356, Title IV, 42 Stat. 858, 982; U. S. C., Title 19, Sec. 497.)

The above section was repealed as of June 18, 1930, by the Tariff Act of 1930, c. 497, Secs. 651 (a), 653, 46 Stat. 590, 762 (U. S. C. Sup. V, Title 19, secs.

1651, 1653), but Section 651 (c) of that Act (p. 763) provided that—

> * * * All offenses committed and all penalties, under any statute embraced in, or changed, modified, or repealed by this Act may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed. * * *

A provision identical in language with that quoted above from Section 593 (b) of the Tariff Act of 1922 was included in the Tariff Act of 1930. (Sec. 593 (b), c. 497, 46 Stat. 751; U. S. C. Sup. V, Title 19, Sec. 1593.)

Section 3, Title II, of the National Prohibition Act, is in part as follows:

> No person shall * * * import * * * any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes * * * may be * * * imported * * * but only as herein provided, and the commissioner may, upon application, issue permits therefor * * *. (Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 308; U. S. C., Title 27, Sec. 12.)

Section 29, Title II, of the National Prohibition Act reads in part:

* * * * *

> Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500 * * *. (41 Stat. 316; U. S. C., Title 27, Sec. 46.)

STATEMENT

Petitioner and others were jointly indicted in the District Court for the District of Delaware upon two counts charging violations of Section 593 (b) of the Tariff Act of 1922. (R. 3–5.) The first count charged that certain named defendants, on November 10, 1927—

> did unlawfully, wilfully, feloniously, knowingly and fraudulently import and bring into the United States, and assist in importing and bringing into the United States, to wit, from St. Pierre-Miquelon into the territorial waters of the District of Delaware * * * certain merchandise, contrary to law, to wit, a large quantity of intoxicating liquor, to wit * * * all of said intoxicating liquors containing more than one-half of one per centum of alcohol by volume and being fit for use for beverage purposes—in violation of the provisions of Section 593, Subdivision B of the Act of Congress of September 21, 1922, known as the Tariff Act of 1922 * * *.

The count then alleged that the importations were illegal in that the merchandise was brought into the United States—

(a) Without a permit from the Commissioner of Internal Revenue as required by Schedule 8 of the Tariff Act of 1922.

(b) Without payment of the customs duties thereon as required by the aforesaid schedule.

(c) And in that said merchandise was imported and brought into the United States in violation of Section 3, Title II, of the National Prohibition Act.

In a separate paragraph of the count petitioner was charged with aiding and abetting the commission of the alleged offense. (R. 4.) The second count of the indictment was dismissed by the United States Attorney at the trial. (R. 124.)

Petitioner's demurrer to the indictment (R. 6–7) was overruled by the trial court on the ground that allegation (c) of the indictment, *supra,* stated an offense under Section 593 (b) of the Tariff Act of 1922 (R. 8–9).

The case, therefore, went to the jury upon the allegations of the first count charging the petitioner with aiding and abetting the importation of intoxicating liquor contrary to the provisions of Section 3, Title II, of the National Prohibition Act. Petitioner was convicted (R. 136) and sentenced to be imprisoned for a year and a day and to pay a fine of $2,500 (R. 141). Upon appeal the conviction was affirmed (R. 151) and a petition for rehearing denied (R. 151). This Court granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 152.)

DISCUSSION

The Government opposed the issuance of the writ of certiorari on the ground that Section 593 (b) of the Tariff Act of 1922 was correctly held by the courts below to embrace the offense charged and to prescribe its penalty. Upon further investigation we are of the opinion that a contrary view may be taken with equal reason. The question is one of legislative intent. At least two approaches to the question are possible, leading to different results. Without urging that either result is correct, we have in this memorandum set forth for the convenience of the Court both lines of argument and submit the question to the Court for decision.

I

Section 593 (b) of the Tariff Act of 1922 punished the fraudulent or knowing importation of merchandise [1] "contrary to law." The indictment charged a violation of this statute and alleged that intoxicating liquor fit for use for beverage purposes had been imported in violation of Section 3, Title II of the National Prohibition Act, which prohibits such importation.

The phrase "contrary to law" appears in Section 593 (b) without any limitation in terms. On its face and without the aid of construction it would

[1] Section 401 of the Tariff Act provides (42 Stat. 948): "The word 'merchandise' means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited."

seem to mean contrary to any law. In this view any fraudulent or knowing importation contrary to any law is within the scope of the section. Hence importation in violation of the National Prohibition Act violates Section 593 (b).

It may be conceded that when Congress enacted Section 593 (b) it was not directly concerned with the amendment of the National Prohibition Act. Its purpose was to fix the penalty for importing merchandise contrary to law, including merchandise the importation of which was prohibited. But inquiry as to whether the prior law was under consideration is foreclosed by the language of the statute, which is clear and unambiguous and admits no limitation. There is no room in the language for construction or for the reading into the statute of an exception to its operation. The language must be presumed to mean what it says. Any other view would give rise to intolerable uncertainty in the application of laws plain and unmistakable in their meaning.

If, then, importation in violation of the National Prohibition Act is an offense under 593 (b), what effect is to be given to the fact that the punishment under the latter statute is the greater of the two? Section 3 of the National Prohibition Act contains no provision for punishment. There is an omnibus clause, Section 29 of Title II of the Act, which provides for the punishment of any person who violates any provision of the title for which no special pen-

alty is prescribed. Section 29 is a general clause, which by its very terms [2] seems to have no application if penalties are prescribed by any other statute. Section 593 (b), on the other hand, provides specific penalties for illegal importation, and was enacted later than Section 29. Under these circumstances the rule of construction which is applicable is that a specific later statute controls where inconsistent with an earlier general one.[3]

The argument outlined above was accepted by the District Court below. (R. 8–9.) We know of no decision to the contrary. The same result was reached in the following cases: *Kurczak* v. *United States,* 14 F. (2d) 109 (C. C. A. 6th); *Dickerson* v. *United States,* 20 F. (2d), 901, 903 (C. C. A. 8th); *Mulane* v. *United States,* 20 F. (2d) 903 (C. C. A. 8th); *Gorsuch* v. *United States,* 34 F. (2d) 279, 280 (C. C. A. 6th); *Krench* v. *United States,* 42 F. (2d) 354, 355 (C. C. A. 6th); *United States* v. *Cardwell,* 9 F. (2d) 146, 147 (E. D. Mich.). Compare *Wabash Ry. Co.* v. *United States,* 15 F. (2d) 363, 364 (C. C. A. 6th); *West* v. *United States,* 15 F. (2d)

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[2] Any person * * * who * * * violates any of the provisions of this title, for *which offense a special penalty is not prescribed*, shall be fined * * *" (Italics ours.)

[3] This position is strengthened by the express repeal in Section 644 the Tariff Act of 1922 of all laws and parts of laws inconsistent with its provisions and by the express inclusion in Section 593 (b), when read with Section 401, *supra*, footnote 1, of prohibited importations of goods, wares, and chattels of every description.

916 (C. C. A. 8th); *Charles Zimmerman Sons Co.* v. *Ferguson,* 16 F. (2d) 604, 605 (E. D. Mich.), rehearing denied, 18 F. (2d) 125. See also *Goldberg* v. *United States,* 277 Fed. 211 (C. C. A. 8th); *Biddle* v. *Moreno,* 279 Fed. 566 (C. C. A. 8th); *Bookbinder* v. *United States,* 287 Fed. 790 (C. C. A. 3d), certiorari denied, 262 U. S. 748; *Nounes* v. *United States,* 4 F. (2d) 833, 835 (C. C. A. 5th), certiorari denied, 268 U. S. 695. But see *Bruno* v. *United States,* 289 Fed. 649 (C. C. A. 1st.)

In *United States* v. *S. S. Sebastopol* the Circuit Court of Appeals for the Second Circuit recently held that Section 594 of the Tariff Act of 1922 prevails over Section 26 of the National Prohibition Act. The opinion, which is not yet reported, is printed in full in the Appendix, *infra,* pp. 14–20.

In this view of the case it is unnecessary to discuss the effect of the Willis-Campbell Act, since no question of conflict between the National Prohibition Act and *earlier* statutes is involved.

II

Section 593 (b) of the Tariff Act of 1922 was a reenactment without substantial change of the provisions of Section 3082 of the Revised Statutes, which had been on the books for many years before the National Prohibition Act. When Section 3082 was enacted, importation of intoxicating liquor for beverage purposes was not illegal. It was made so by Section 3 of the Prohibition Act, which, in Section 29, provided a penalty for the offense, milder

than that of Section 3082. Under such circumstances the only reasonable conclusion is that Congress intended the penalty for illegal importation of intoxicating liquor provided by Section 29 to be exclusive. *United States* v. *Yuginovich*, 256 U. S. 450.

A contrary view would ascribe to Congress an intent that the unlawful importation criminally punished by the National Prohibition Act should be additionally punished by the imposition of the penalty prescribed by Section 3082. Such a construction seems unreasonable. This Court has said (*Farmers', etc., National Bank* v. *Dearing*, 91 U. S. 29, 35):

> Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.

Shortly after this Court decided the *Yuginovich* case, Congress enacted the Willis-Campbell Act, Section 5 of which provided (c. 134, 42 Stat. 222, 223):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; * * *

In *United States* v. *Stafoff*, 260 U. S. 477, this Court held that the Willis-Campbell Act reenacted the laws held in the *Yuginovich* case to have been impliedly repealed by the National Prohibition Act. None of the laws so dealt with were "directly in conflict with any provision of the National Prohibition Act" within the proviso of the Willis-Campbell Act. Section 3082, on the other hand, was directly in conflict with Section 29 of the National Prohibition Act in providing a greater penalty for the crime of illegal importation. Hence the Willis-Campbell Act did not revive Section 3082 in so far as applicable to importation of intoxicating liquor. In this respect the decision of the Circuit Court of Appeals below was in error. (R. 149-150.) See also *Bruno* v. *United States*, 289 Fed. 649 (C. C. A. 1st).

Thus it seems clear that until the Tariff Act of 1922 the importation of intoxicating liquor was not subject to the penalties imposed by Section 3082. Was this situation changed by the reenactment of Section 3082, without substantial alteration, as 593 (b) of the Tariff Act of 1922?[1] It seems unreasonable to say that Congress, merely by re-

[1] Although the language of Section 401 of the Tariff Act of 1922, *supra*, footnote 1, differs from that of its earlier prototype, Section 2766 of the Revised Statutes, which defined "merchandise" to include "goods, wares, and chattels of every description capable of being imported," the new definition was merely declaratory of the interpretation which had been given to the old one. See *United States* v. *Sischo*, 262 U. S. 165; cf. *Harford* v. *United States*, 8 Cranch 109.

iterating words which until then did not have the effect of punishing violations of Section 3 of the National Prohibition Act, gave them a new meaning. In dealing with a tariff measure Congress is concerned mainly with the minutiae of what articles should be taxed upon importation, and what rates of duty should be imposed. The reenactment without change of administrative or penal provisions of a tariff act should not in reason be given the effect of changing the punishment provided in an earlier statute for the importation there prohibited. Compare *United States* v. *La Franca,* 282 U. S. 568, 571, 572; *United States* v. *Regan,* 232 U. S. 37, 47.

We add a few words concerning the Jones Act (March 2, 1929, c. 473, 45 Stat. 1446), which provided increased penalties—

> * * * wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor * * *.

The point is made that Congress provided in the Jones Act an increased penalty for importation of liquor in violation of the National Prohibition Act and its amendments and supplements[*] and that this is evidence that the importation of intoxicating

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[*] The Willis-Campbell Act was entitled "An Act Supplemental to the National Prohibition Act."

liquor is punishable only under the provisions of the National Prohibition Act. But this really begs the question, because if Section 593 (b) of the Tariff Act of 1922 be regarded as amending the National Prohibition Act[6] in that it increases the penalty provided by the latter for illegal importation of intoxicating liquor, then the effect of the Jones Act was merely to increase the maximum penalty provided by Section 593 (b) for such importation.

CONCLUSION

We have grave doubt as to the legality of the sentence imposed upon petitioner and submit that question to the Court for decision. In any view of the case, petitioner was convicted of importing intoxicating liquor in violation of Section 3 of the National Prohibition Act; and if the sentence imposed was not warranted because Section 593 (b) of the Tariff Act of 1922 has no application, then we submit that the case should be remanded to the District Court for sentence under Section 29 of the National Prohibition Act.

Respectfully submitted.

THOMAS D. THACHER,
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G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
Attorney.

MARCH, 1932.

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[6] Compare *United States* v. *La Franca*, *supra*, 282 U. S. 568, 575, 576.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, LIBELLANT-APPELLANT

v.

BRITISH S. S. "SEBASTOPOL," HER ENGINES, Tackle, Apparel, and Furniture, etc., Claimant-Appellee

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UNITED STATES OF AMERICA, LIBELLANT-APPELLANT

v.

TWO MASTED AUXILIARY SCHOONER "RUTH MILdred," Length 82 feet, Beam 21.5 feet, Depth 8.1 feet, Official No. 222218, Claimant-Appellee

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Before: L. HAND, SWAN, and AUGUSTUS N. HAND, *Circuit Judges*

Appeals from the District Court of the United States for the Southern District of New York

Libels of information in the admiralty were filed by the United States, one seeking forfeiture of the British steamer *Sebastopol* for violation of the customs laws, the other seeking forfeiture of the American Schooner *Ruth Mildred* for violation of the navigation laws. In each suit a decree was

entered dismissing the libel, and the libellant has appealed. Decree as to the *Sebastopol* reversed; decree as to the *Ruth Mildred* affirmed.

For opinion below see 47 F. (2d) 336.

SWAN, *Circuit Judge:*

These appeals have been argued together and may be disposed of in a single opinion, although, as will appear, somewhat different considerations are involved and have led us to different results in the two suits. The general problem presented is whether a vessel which is discovered in the illegal transportation of liquor within territorial waters must be proceeded against under sec. 26 of Title II of the National Prohibition Act (27 U. S. C. A., sec. 40) rather than for a violation of the customs or navigation laws.

The libel against the *Sebastopol* sought to enforce against her, pursuant to section 594 of the Tariff Act of 1922 (19 U. S. C. A., sec. 498), penalties incurred by her master under section 584 of said Act (19 U. S. C. A., sec. 486) by reason of false manifesting of the cargo. Within territorial waters she was stopped and boarded by a coast guard officer, who, upon discovery that her cargo was falsely manifested, arrested the master and seized the vessel. The unmanifested cargo consisted of 4,841 cases of Scotch whiskey. Following seizure of the vessel, the coast guard officer signed a complaint charging the master and crew with conspiracy to violate the National Prohibition Act as well as the Tariff Act of 1922. Nothing appears as to the ultimate disposition of this complaint. These facts, the claimant contended, disclosed that the vessel was engaged in the illegal transportation of liquor and required the government to proceed against her

in accordance with section 26 of Title II of the National Prohibition Act (27 U. S. C. A., sec. 40) instead of under the Tariff Act. The district court so held, dismissing the complaint.

That the seizure was not made by a prohibition officer would not preclude the government from proceeding under section 26. *Dodge* v. *United States,* 272 U. S. 530; *Commercial Credit Co.* v. *United States,* 276 U. S. 226. That section preserves the rights of innocent owners or lienors; while forfeiture under the Tariff Act proceeds without regard to innocent interests. It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 U. S. C. A., secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture. The two procedures are, therefore, in direct conflict when applied to the forfeiture of a vessel seized within territorial waters while transporting unmanifested liquor; and the Prohibition Act, were it the later enactment, would prevail, as the Supreme Court held it did with respect to Revised Statutes, sec. 3450. *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. But it is to be observed that the particular sections of the Tariff Act under which the libel against the Sebastopol was framed do not declare a forfeiture of the vessel; they merely impose a lien upon her for the payment of penalties incurred by the master. It may well be argued that a proceeding to enforce a lien under the Tariff Act is not in direct conflict with the proceeding to forfeit the vessel contemplated by section 26. Only by accident is it true in the case at bar that the penalty incurred is so great as to exhaust the entire value of the vessel and result in her

forfeiture. The two statutes are to be read so that both may stand, if possible, and we are disposed to say that no direct conflict appears when only the lien of a penalty is being enforced.

But if there be a direct conflict, the Tariff Act must prevail over sec. 26. It is the later enactment and contains in sec. 644 an express repeal of "all laws and parts of laws inconsistent with the provisions of this Act." In reaching this conclusion we are not unmindful of the canon of construction that an earlier specific statute may be considered an exception to a later general statute broad enough in terms to include the subject matter of the former; but we do not think it applicable here, because the Tariff Act itself deals specifically with the importation of liquors in violation of the customs. Paragraph 813 of schedule 8 reads as follows:

> No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.[7]

The forfeiture thus directed is provided for in section 584, which declares, among other things, that unmanifested merchandise (which by section 401 "includes merchandise the importation of which

[7] Schedule 8 also provides (Par. 801 (a), 46 Stat. 689): "Nothing in this schedule shall be construed as in any manner limiting or restricting the provisions of the National Prohibition Act, as amended." (Footnote ours.)

is forbidden") consigned to the master shall be subject to forfeiture. Under the doctrine of The Mistinguette, 27 F. (2d) 738 (C. C. A. 2) the liquor on the *Sebastopol* was consigned to her master. It was therefore forfeitable under section 584, and it seems clear that the other provisions of this section which impose a penalty upon the master equal to the value of the unmanifested cargo are likewise applicable although the cargo be liquor. Similarly, as to the ancillary section 594 which subjects the vessel to a lien for the penalties incurred by the master. Therefore, notwithstanding the abovementioned canon of interpretation and despite the statement in paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restricting the provisions of the National Prohibition Act, we can not interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding pro tanto the earlier enacted section 26, if a conflict exists. Consequently the libel brought against the *Sebastopol* was erroneously dismissed.

Different considerations are applicable to the schooner *Ruth Mildred*. She was licensed to engage in the fisheries and was charged with violating her license by engaging in the illicit liquor trade. Forfeiture was sought under Revised Statutes, sec. 4377. Violation of her license results under this statute in forfeiture of the vessel without regard to the innocence of her owner. This section antedates the National Prohibition Act and is therefore superseded by section 26 so far as the two statutes are in direct conflict. As already noted with respect to the Tariff Act, the possibility of

executive clemency under the provisions of Revised Statutes, section 5294, will not avoid the conflict. Dismissal of the libel against the *Ruth Mildred* was therefore right provided she was seized under circumstances which rendered section 26 applicable.

The schooner was trailed by a coast guard vessel from a point in Long Island Sound until she tied up at a dock in New York harbor. The crew and master then left her, but a few minutes later the master returned and, on being informed that the coast guard vessel was going to stand by until the schooner's cargo was unloaded, he confessed that most of his cargo was liquor. Thereupon he was placed under arrest, the boat was seized, and a complaint filed, charging the master with conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. Nothing further is disclosed regarding this proceeding.

Section 26 directs that when a person is discovered in the act of illegally transporting liquors in any water craft, the officer of the law shall seize the liquors "therein being transported contrary to law" and shall take possession of the boat. When the schooner and her cargo were seized she had come to rest at the wharf, and it may be argued with some plausibility that the transportation was over so that section 26 no longer applied. *United States* v. *One Buick Automobile,* 33 F. (2d) 353 (S. D. Ga.); cf. (before transportation began) *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321; *United States* v. *One Studebaker Coach Automobile,* 32 F. (2d) 886 (C. C. A. 9). But we do not think the section should receive so technical a construction. Here the master was discovered in the act of transportation, although knowledge

of the nature of his cargo was not obtained until his subsequent confession. In our opinion his possession of the liquor continued to be a possession incident to transportation, and the facts were sufficient to satisfy the condition precedent to making a seizure under section 26. See *Commercial Credit Co.* v. *United States*, 33 F. (2d) 228 (C. C. A. 9); *United States* v. *One Chevrolet Automobile*, 21 F. (2d) 277 (D. Ala.), aff'd as *United States* v. *General Motors Acceptance Corp.*, 25 F. (2d) 238 (C. C. A. 5); *United States* v. *One Buick Coach Automobile*, 34 F. (2d) 318 (N. D. Ind.). Accordingly, we affirm the decree dismissing the libel as to the *Ruth Mildred*.

The problem presented by these appeals has been the subject of considerable diversity of opinion in the various circuits. An authoritative decision may soon be expected, as the Ninth Circuit has certified a similar question to the Supreme Court. *Gen. Motors Acceptance Corp.* v. *United States*, Nov. 23, 1931. Pending this decision any elaborate consideration of the authorities seems unnecessary. It will suffice merely to cite a few of them. As tending to favor the contentions of the appellant, see *The Pilot*, 43 F. (2d) 491 (C. C. A. 4); *United States* v. *One Reo Coupe Automobile*, 46 F. (2d) 815 (D. Mass.); *The Daisy T*, 48 F. (2d) 370 (D. Del.); contra, *Colon* v. *Hanlon*, 50 F. (2d) 353 (C. C. A. 1); *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977 (C. C. A. 5); *United States* v. *One Studebaker Automobile*, 45 F. (2d) 430 (D. Ariz.).

Decree in No. 279 reversed and decree in No. 280 affirmed.

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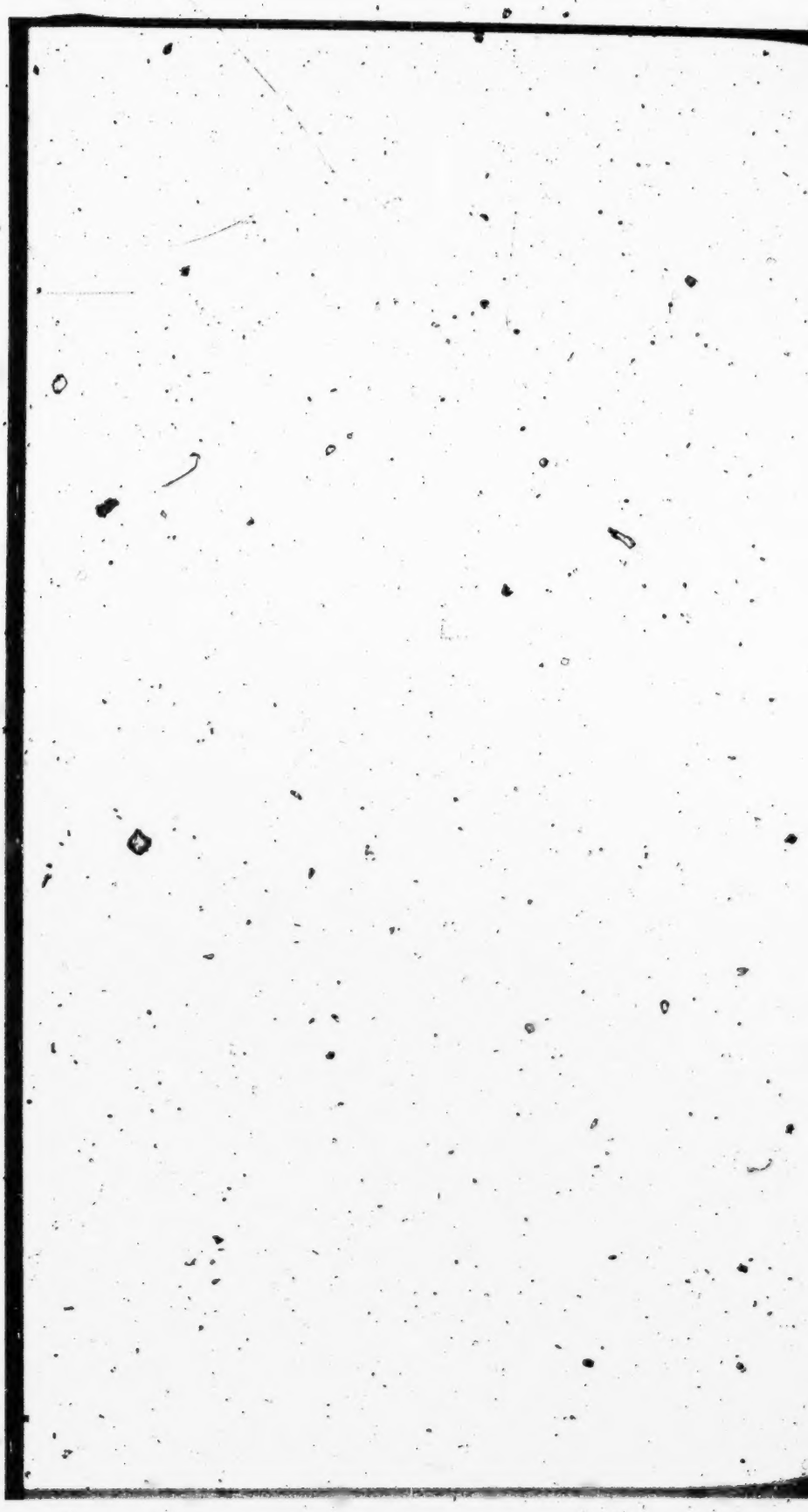

SUPREME COURT OF THE UNITED STATES.

No. 576.—October Term, 1931.

John T. Callahan, Petitioner, *vs.* United States. } On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

[April 11, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was indicted under § 593 (b) of the Tariff Act of 1922,[1] for aiding and abetting the importation of intoxicating liquors contrary to law, the specified illegality being violation of Title II, § 3, of the National Prohibition Act.[2] In support of a demurrer he asserted the indictment set forth an offense under the prohibition act and failed to charge one under the cited section of the tariff act; and was duplicitous as including offenses under both statutes. The demurrer was overruled, trial and conviction followed, and petitioner was sentenced under § 593 (b). The circuit court of appeals affirmed the judgment, and this court granted certiorari.

We are asked to hold that one who violates the prohibition act by importing liquor, may not be indicted, tried and sentenced under the tariff act, which makes the importation of "any merchandise[3] contrary to law" a criminal offense. The phrase "con-

[1] U. S. C., Tit. 19, § 497. "If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law . . . the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both . . ."

[2] U. S. C., Tit. 27, § 12. "No person shall . . . import . . . any intoxicating liquor except as authorized in this chapter. . . . Liquor for non-beverage purposes . . . may be . . . imported . . . but only as herein provided, and the commissioner may, upon application, issue permits therefor. . . ."

[3] Section 401 of the Tariff Act (U. S. C., Tit. 19, § 231) provides: "The word 'merchandise' means goods, wares and chattels of every description and includes merchandise the importation of which is prohibited."

trary to law" as used in the later act is unqualified and taken in its natural meaning signifies "contrary to any law", and hence contrary to the earlier prohibition act, so that a violation of that act would be an offense within the other.

The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation and provides a penalty therefor; whereas the tariff act is concerned with a wholly separate subject and the penal section 593 (b) aimed at unlawful importation should not be construed as repealing the earlier special statute. (*Ex parte Crow Dog*, 109 U. S. 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87-89; *Washington* v. *Miller*, 235 U. S. 422, 428.) This argument overlooks the fact that the National Prohibition Act prescribes no special penalty for importation in violation of its provisions. Section 29 of Title II, an omnibus section fixing penalties for violations for which no special penalty is prescribed, is the only one under which punishment could be imposed for illegal importation.[4] The language used is sufficiently broad to include specific penalties fixed in other sections of the statute and also such as might be imposed by separate legislation. The tariff act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section of the earlier act. In this respect it superseded the general provisions of the prior statute embracing the same subject. *Cook County National Bank* v. *United States*, 107 U. S. 445; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 22. The indictment charged an offense under the Tariff Act and the judgment must be affirmed.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[4] U. S. C., Tit. 27, § 46. "Any person . . . who . . . violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500. . . ."

[5] See *Kurcsak* v. *United States*, 14 F. (2d) 109; *Dickerson* v. *United States*, 20 F. (2d) 901; *Gorsuch* v. *United States*, 34 F. (2d) 279.